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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 402

J. I. CASE COMPANY, ET AL., PETITIONERS,

vs.

CARL H. BORAK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 26, 1963
CERTIORARI GRANTED NOVEMBER 12, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. 10] [File endorsement omitted]

**IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

CARL H. BORAK, Plaintiff,

v.

J. I. CASE COMPANY, a Wisconsin corporation, JOHN T. BROWN, H. G. BARR, L. R. CLAUSEN, WILLIAM J. GREDE, and WILLIAM B. PETERS, Defendants.

COMPLAINT—Filed November 13, 1956

Plaintiff, by his attorneys, Bruno V. Bitker, Alex Elson and Arnold I. Shure, alleges upon information and belief, except for paragraphs 1 to 7 inclusive, 9, 10, 11, 12, 13, 14, 15, 22 and 23, as follows:

1. Plaintiff Carl H. Borak, at all times herein mentioned was and now is a resident and citizen of the State of Illinois. He has been, since 1952, the registered and actual owner and holder of common stock of J. I. Case Company, formerly J. I. Case Threshing Machine Company, herein-after referred to as "Case", 1,000 shares of which he purchased in 1952, and 1,000 shares of which he purchased in 1955.

2. Plaintiff brings this action in a representative capacity on behalf of himself and all of the common stockholders of Case, who are similarly situated to him, and alleges that he is well able to fairly and effectively represent such common stockholders.

3. Defendant Case, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, [fol. 11] is a resident of and doing business in that State and has its principal office in that State.

4. Defendants John T. Brown, H. G. Barr, William J. Grede, and William B. Peters were, at all times relevant hereto, officers and directors of Case. Defendant John T. Brown has been a director of Case since 1947 and was and

now is Chairman of the Board of Directors and President of Case. Defendant H. G. Barr has been a Director of Case since 1952 and was and now is Vice President of Case. Defendant L. R. Clausen has been a director of Case since 1924 and was Chairman of the Board of Case until November 1, 1955. Defendant William J. Grede has been a director of Case since 1953 and now is Chairman of the Executive Committee of Case. Defendant William B. Peters has been a director of Case since 1955 and was and now is Treasurer and Controller of Case. Said defendants are residents of the State of Wisconsin.

5. This action is not a collusive one instituted for the purpose of conferring upon a court of the United States jurisdiction of a cause of action over which it would not otherwise have cognizance, and the jurisdiction of this court depends upon diversity of citizenship.

6. The matter in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand (\$3,000.00) Dollars.

7. Case is a full line producer of farm machinery, including tractors and all of the equipment generally used in plowing, tilling, fertilizing, planting and seeding, cultivating, making hay and silage and harvesting grains, seeds, corn and many other crops. In addition, it produces and sells for non-farm use wheel tractors and power engine units. It and its predecessors have been in the farm machinery business since 1842.

[fol. 12] 8. American Tractor Corporation, hereinafter referred to as "ATC" was founded in 1948 under the name of Washington Tractor and Farm Equipment Corporation and changed its name in 1949 to American Tractor Corporation. In 1950 it purchased from the Federal Machine and Welder Company of Warren, Ohio, the manufacturer of the USTRAC crawler tractor, a substantial inventory of Ustrac and Clarkair tractor parts and the use of all the engineering drawings, jigs, dies, fixtures and tooling of the Ustrac tractor. It acquired a factory site at Churubusco, Indiana in 1950 consisting of a frame building with a floor area of approximately 6,900 square feet.

Since that time it has engaged in an extensive new product development and tooling program. It now claims to have a line of five models of crawler tractors, together with a line of loaders with bulldozers, angledozers, and other industrial and specialized equipment. The business of ATC is further described in Exhibit A attached hereto, pages 11 through 13.

9. On or about September 6, 1956, the Boards of Directors of Case and ATC approved plans for the merger of the two companies. On or about October 2, 1956, the Board of Directors of Case approved the plan of merger. Under date of October 15, 1956, Case issued to its stockholders a printed brochure, including the following: letter signed by defendant J. G. Brown as President and Chairman of the Board, a notice of Special Meeting of Stockholders to be held November 15, 1956, to consider and take action upon the plan of merger; a proxy statement describing the plan; the plan of merger; articles of merger and certificate of consolidation. The brochure is attached hereto and made a part hereof as Exhibit A.

10. The capitalization of Case as of July 31, 1956, was as follows:

[fol. 13]

Twenty-five year 3½% Sinking Fund Debentures due February 1, 1978 (Sink- ing Fund payments of \$630,000 per year are required, starting in 1958).—	\$25,000,000
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Capital Stock:

7% cumulative preferred stock: au- thorized—101,825 shares \$100.00 par value each; issued—92,906 shares—	\$9,290,600
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Common Stock:

Authorized—4,000,000 shares of \$12.50 par value each; issued—2,262,766 shares	28,284,575	37,575,175
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11. The capitalization of ATC as of July 31, 1956, was as follows:

Long term indebtedness—

Secured by first real estate mortgage on plant and plant site held by the Marine Midland Trust Company of New York and by chattel mortgage on all machinery owned and hereafter acquired, of which \$99,000 as of July 31, 1956, is shown as a current liability and \$801,000 is shown as a long term obligation. The \$900,000 balance is payable \$9,000 a month for twelve months commencing September 30, 1956, \$16,500 per month for the next year and \$18,000 a month thereafter; long term obligation—

801,000

250,000 shares of convertible preferred stock par value \$20.00 a share, of which the following shares were outstanding as of October 1, 1956:

Convertible Preferred Stock, Series 55-1, convertible into shares of common stock at a price of \$20.00 per share—

12,500 shares

Convertible Preferred Stock, Series 56-1, convertible into shares of common stock at a price of \$16.00 per share—

50,000 shares

Convertible Preferred Stock, Series 56-2, convertible into shares of common stock at a price of \$16.00 per share—

50,000 shares

Authorized common stock of 2,000,000 shares at 25¢ par value issued and outstanding at July 31, 1956— 1,107,704

As of October 1, 1956, there were outstanding options to purchase an aggregate of 9,547 shares of stock of ATC.

There were also outstanding on the same date stock purchase warrants to purchase an aggregate of 180,000 shares of common stock of ATC, and 137,500 shares of common stock against conversions of convertible preferred stock.

[fol. 14] 12. Under the plan of merger there will be added to the authorized capital stock of Case 1,300,000 shares of a new 6½% cumulative preferred stock par value \$7.00 a share. In addition the common stock of Case will be increased from 2,262,766 shares to 2,816,618. If the plan of merger is approved each share of common stock of ATC will be converted into (1) ½ share of common stock of Case and (2) 1 share of the new 6½% second cumulative preferred stock of Case.

13. Without waiting for shareholder approval of its action, and even before formal approval of the Board of Directors of the plan of merger, the defendant officers of Case caused Case, on or about September 24, 1956, to purchase 50,000 shares of ATC convertible preferred stock, series 56-2, at a price of \$20.00 per share or an aggregate of \$1,000,000. They also caused Case to purchase on the same date, for \$500.00, stock purchase warrants entitling the holder to purchase an aggregate of 90,000 shares of ATC common stock at \$16.00 a share until September 24, 1959. The proxy statement states that the said shares and warrants were purchased by Case to provide ATC with working capital pending the effectiveness or abandonment of the merger. (Exhibit A hereto attached, p. 3).

Under the terms of the merger plan all outstanding shares of convertible preferred stock of ATC, including the 50,000 shares of convertible preferred stock, series 56-2, held by Case will be redeemed at a price of \$21.00 a share. This is to be accomplished by Case providing sufficient funds to enable ATC to make such redemption. In order to make such redemption Case will be required to provide \$2,362,500, of which \$1,050,000 would represent redemption of the \$50,000 shares of ATC convertible preferred stock, series 56-2, held by Case. Under the terms of the plan of [fol. 15] merger the warrants to purchase ATC common stock held by Case would terminate when the merger is consummated. However, holders of the remaining warrants to purchase 90,000 shares of ATC common stock would be

entitled to purchase, up to February 2, 1959, at the price of \$16.00 per share of ATC common stock, the number of shares of common stock and 6½% second cumulative preferred stock par value \$7.00 a share to which they would have been entitled had they exercised their warrants to purchase shares of ATC common stock and held such shares at the date of merger.

14. Under the terms of the proposed amendment to the articles of association of Case, provision is made for the 6½% second cumulative preferred stock as follows: Each share of such stock is entitled to receive, when and as declared by the Board of Directors, before any dividends are paid on common stock, dividends at the rate of 6½% of the par value thereof, payable quarterly; such dividends to accrue from date of issue if that be a dividend day, or otherwise five days after the date of the approval of the merger by stockholders of Case and ATC. Holders of such stock have the right, voting as a class, to elect two members of Case to the Board of Directors if, at any time, six quarterly dividend instalments, whether or not consecutive, have not been paid to holders of such stock. In any voluntary liquidation subject only to the prior rights of the 7% cumulative preferred stock, holders of second cumulative preferred stock are entitled to receive \$7.35 per share plus accrued dividends; in the case of involuntary liquidation \$7.00 per share plus accrued dividends. Stock is redeemable at the option of Case on not less than thirty (30) days notice at \$7.35 per share plus accrued dividends, unless there are unpaid accrued dividends on the 7% cumulative preferred stock. Case may not redeem the second cumulative preferred stock if dividends [fol. 16] have not been paid unless it redeems all of the outstanding shares. Holders of second cumulative preferred stock have preemptive rights with respect to any authorized and unauthorized shares of such stock which may be issued in Case.

15. Contrary to the statement made in the proxy statement (Exhibit A hereto attached, p. 2), that "Shares of Common Stock and 7% Cumulative Preferred Stock of

Case outstanding on the effective date of the merger will not be affected as a result of the merger, and will remain outstanding as shares of Case, surviving corporation" the effect of the merger if approved will be to increase the dividend requirement which must be met before any dividends can be paid to common stockholders, to a total of \$1,154,347 per annum, (exclusive of any additional dividend requirement which may result to warrant holders for 90,000 shares of ATC stock upon exercise of warrant rights) of which \$504,005 will be payable to the holders of the second cumulative preferred stock as a result of the merger. There will be a further charge against earnings of an amount which, according to the proxy statement, is presently undeterminable, for amortization of excess of costs of assets acquired over assigned value thereof. According to the pro-forma balance sheet dated July 31, 1956, giving effect to the merger, such excess of cost of assets is shown as \$11,990,665, which, according to note 5 to the pro-forma balance sheet, will be amortized over a period not in excess of twenty years (Exhibit A hereto attached, pp. 38-40). Depreciation of approximately \$80,000 a year on the increased carrying value of the property, plant and equipment of ATC will also be a charge against earnings. The dividend rights of holders of both 7% and 6½% preferred stock are cumulative to the extent that no dividends can be [fol. 17] paid to holders of common stock until all dividends are paid to preferred stockholders. In addition, as above pointed out, holders of such second cumulative preferred stock resulting from the merger would have the right under the circumstances set forth above to elect as a class two members of the Board of Directors and would have the right either in voluntary or involuntary liquidation to a prior claim to the assets of the corporation, in an amount not less than \$7,753,928.

16. Another immediate and direct consequence of the proposed merger will be to dilute the present book value of the common stock of Case, by the issuance of 553,852 additional shares of common stock, to the injury of the present shareholders of Case. Dilution would result in a loss per share of approximately \$10.00 per share.

17. Contrary to the representations made by the defendant officers of Case in Exhibit A hereto attached, the proposed merger is against the best interests of the common stockholders of Case similarly situated to plaintiff, and is in fact seriously prejudicial to their rights. Said plan of merger has not been formulated or developed in conformity with the obligations imposed upon defendant officers and directors of Case by law.

(a) The primary effect of the merger is to give voting control of Case to outsiders not previously associated with management and not shareholders of the company. This results from the exchange of shares under the proposed merger which would give to the shareholders of ATC approximately 14% of the voting rights of Case, of which approximately one-half would be in the hands of two individuals, Marc B. Rojzman and his wife, Lillian Rojzman. Because the stock of Case is held by approximately 8,000 persons and institutions widely scattered throughout the country and is, for the most part owned in small amounts, these stockholders of ATC would be given effective voting control over Case. It would appear that the present management, by giving three places on the Board of Directors to ATC stockholders and an important position to Marc B. Rojzman, hopes to have the benefit of the voting rights of Mr. Rojzman and his associates and, through him and his associates continue in the management of Case. In addition to fees and salaries received by the defendant officers in excess of \$300,000 per year, the officers also take part in a pension plan and certain of defendant officers will be entitled to participate in a liberalized stock option plan submitted for stockholder approval at the same time as the merger.

(b) Since the end of 1952 the sales and earnings of Case have sharply decreased. Although there has been a general decline in the farm implement industry, Case has not kept its share of the market and its sales and earnings have declined considerably more than its competitors. The record of sales, earnings and dividends, beginning with the year 1952 are as follows:

(000 Omitted)

Fiscal Year Ended October 31	Net Sales	Net Earnings or (Loss)	Net Earnings or (Loss) Applicable to Common Stock	Per Share of Common Stock, Par Value \$12.50(1)	
				Net Earnings or (Loss)	Dividends Paid
1952	142,898	7,049	6,399	282	2.50
1953	104,463	781	131	.06	2.00
1954	87,112	(549)	(1,199)	(.53)	.50
1955	88,894	903	253(6)	.11	—
Nine months ended July 31, 1955 (un- audited)	68,009	25	(463)	(.20)	—
1956 (un- audited)	59,612	(3,703)	(4,191)	(1.85)	—

() Indicates negative figure.

[fol. 19] (c) Examination of the balance sheet of Case for the year ended October 31, 1955, and for July 31, 1956 (Exhibit A attached hereto, pp. 24-25) shows that there has been, since October 31, 1955, an increase of almost \$14,000,000 in customer accounts from \$46,364,981 on October 31, 1955, to \$60,802,870. During the same period inventories have been reduced approximately two and one-half million dollars and accumulated earnings retained in the company have been reduced in excess of \$4,000,000. Sales have sharply declined in the first nine months ended July 31, 1956. Sales for this period were \$59,612,000 in contrast with \$68,009,000 for the comparable period of the previous fiscal year. A substantial part of such sales are in fact, paper sales to dealers with the understanding that the dealers will not have to pay for the equipment placed with them unless actually sold. That even with such inflated sales there was a net loss for the first nine months ending July 31, 1956 of \$3,703,000 and net loss applicable to common stock of \$4,191,000 or \$1.85 per share of common stock.

(d) In a desperate effort to attempt to ward off stockholders of the Company and the possibilities of a proxy fight which conceivably would upset the control of management in the hands of the defendant officers, defendants ar-

ranged the merger transaction with ATC herein referred to.

(e) Section 180.14 of the Wisconsin Business Corporation Law, as amended, provides: "Shares having a par value may be issued for such consideration, *not less than par value thereof*, as shall be fixed from time to time by the Board of Directors" (italics supplied). In fixing the consideration for the shares of stock to be issued by Case to ATC for the assets of ATC if the merger is effected, the [fol. 20] Board of Directors of Case, acting under the domination and control of the defendant officers, violated the said provision of said Section 180.14, in that the consideration fixed was less than the par value of such securities.

The Board of Directors of Case, acting under the domination and control of the defendant officers, fixed what they describe as "the minimum fair value of the net assets of ATC to be acquired in the merger" as \$14,757,068. (Exhibit A attached hereto, p. 40). The par value of the securities is \$14,677,078, determined as follows:

1,107,704 shares of 6½% Second Cumulative Preferred Stock, \$7 par value—	\$ 7,753,928
553,852 shares of Common Stock, \$12.50 par value—	6,923,150
	<hr/>
	\$14,677,078
	<hr/>

Case also agreed to redeem the preferred stock of ATC at a cost of \$2,362,500. While \$1,050,000 of the amount is to be received by Case in redemption of 50,000 shares purchased by it as alleged above on September 24, 1956, the effect of the redemption would, nevertheless, result in a cash outlay of \$2,362,500 by Case, in addition to the issuance of the securities. In determining the consideration received by Case for the securities so issued there should therefore be deducted from the sum of \$14,757,068, determined by the Board of Directors to be the consideration for the assets, the sum of \$2,362,500. The consideration received for the securities would accordingly be \$12,394,568, or \$2,372,510 less than the par value of such securities.

(f) In fixing the consideration to be paid for the shares of Case stock to be issued to ATC stockholders if the merger is consummated, the Board of Directors further [fol. 21] violated the requirements of Section 180.14 and 180.16 of the Wisconsin Business Corporation Act, as amended, by wording their determination of the value of the assets to be received from ATC as a "minimum valuation". The Board of Directors were under a duty to fix the consideration at a specific amount in order that the requirement of Section 180.16 (1) that the par value of the consideration would be shown in the stated capital account and that the excess over par value, if any, would be shown as capital surplus. As appears from the pro-forma balance sheet for Case as of July 31, 1956, giving effect to the merger of Case and ATC (Exhibit A attached hereto, pp. 38-40), the consideration received for the shares of stock of Case is shown only in the stated capital account at the par value of the securities, and no excess over par value is shown in the capital surplus account. From this pro-forma balance sheet it would appear that despite other statements contained in the proxy statement, the consideration received by Case for the shares of Case to be issued by it to shareholders of ATC in the merger were assets of a value not exceeding par value. In failing to fix a certain and determinable dollar amount as to the value of ATC assets, the Board of Directors, acting under the domination and control of the defendant officers, further violated their duty of making it possible for shareholders to form an intelligent and informed judgment on the advisability of the merger.

(g) The value placed upon the assets of ATC is grossly excessive and bears no relationship to the true value. As [fol. 22] appears from the statement of financial condition of ATC (Exhibit A hereto attached, p. 31), the book value of the assets of ATC to be acquired by Case if the merger is consummated, is \$2,525,653. The book value of ATC assets attributable to common stock is \$1.15 per share in contrast with a book value of \$31.29 per share for the common stock of Case after merger. On a book value basis ATC shareholders will be receiving \$15.14 of book value for each of their shares in addition to the preferred stock given to them on a share for share basis. In total ATC

shareholders will receive common stock of Case having a book value of \$17,320,029 plus preferred stock having a par value of \$7,753,928, or a total of \$25,073,957 in exchange for shares which have a book value of \$1,275,653. On a book value basis the exchange is at a rate in excess of 19 to 1.

Another formula for determining value is that of net earnings. Using net earnings basis the price fixed is grossly in excess of the value of ATC. Case stock is valued for purposes of the exchange at par value of \$12.50 per share or approximately eight times average earnings for the five years ended October 31, 1955. ATC is valued for purposes of the exchange at approximately \$13.35 per share or 190 times average net earnings for the five year period. Using current earnings figures ATC stock for purposes of the merger is valued at approximately 45 times earnings. The usual formula for valuing stock in the farm implement industry would be to use a factor not exceeding fifteen times annual earnings.

[fol. 23] Much of the justification offered in the proxy statement (Exhibit A attached hereto) for the value placed on ATC relates to the future prospects of ATC. There is much speculation about the benefits which may be derived from the merger. The proxy statement seeks to give the impression that the ATC line of tractors and other equipment is fully developed, and has been tested in the market. The fact is that a number of important products of ATC have not been subjected to industry experience and some have not been marketed at all. In valuing stock it is unsound and unwise to give weight to speculative and conjectural factors concerned with future development. The proxy statement also gives special weight to the recent stock market price of ATC common stock. Said stock market value is a doubtful test of value. It should be pointed out that the par value of the stock was fixed at 25¢ per share after a thousand for one stock split in 1952 and a two for one stock split in 1955. There were no available quotations for ATC common stock on the over-the-counter market price prior to the third quarter of 1954. At that time the low bid and high offer for such stock as reported by the National Quotation Bureau, Inc., for the third quarter of 1954 were 1½ and

27/8, respectively, and for the fourth quarter of 1954, 31/2 and 63/8, respectively. ATC was not listed on any exchange until January 17, 1955, when it was listed for the first time on the American Stock Exchange. The number of its stockholders is relatively small. The stock has been listed for such a short time and is so unseasoned and untested as to [fol. 24] render dubious the market quotations thereof as being any test of the value of the stock.

(h) In addition to fixing the consideration at a value of approximately \$17,000,000 Case has agreed to acquire the assets by way of a merger which, for purposes of corporate federal income tax will be regarded as being a tax-free reorganization (Exhibit A attached, p. 20). If the form of the acquisition had been by purchase and sale rather than by merger the stockholders of ATC would have a capital gains tax to pay upon the profit realized from the sale of their stock and Case would have been able to amortize the excess of the cost of assets over their true value and thereby be enabled to write off a considerable part of the cost as a proper deduction for income tax purposes. It will be noted that in the pro-forma balance sheet of Case as of July 31, 1956, giving effect to the merger with ATC, the excess of costs of assets acquired over the assigned value thereof is shown as \$11,990,665. The amortization of the amount is proposed over a twenty year period and will, for the period, reduce the earnings available for dividends to holders of common stock of Case. No part of this amortization will be deducted for income tax purposes (Exhibit A hereto attached, pp. 38, 39, and Note 5, p. 40).

18. As additional consideration to the principal stockholders of ATC—three of their group, Marc Rojzman, Edward L. Elliott and Mentor Kraus, are to be elected directors of Case. It is proposed that Marc Rojzman be made Executive Vice President and General Manager of Case with responsibility for the general management of its business affairs. It is also proposed that he be elected to the Executive Committee of Case. It appears from the proxy statement (Exhibit A attached hereto, p. 15) that no determination has been made of Mr. Rojzman's future salary with Case in the event the merger is consummated. It

[fol. 25] is stated that his salary will initially not exceed \$50,000 per annum. It is likely that his salary will be fixed at that amount or close to that amount. In addition it is proposed to grant to him an option to purchase 25,000 shares of common stock of Case upon the merger and the proposed revision of the stock option plan becoming effective.

19. As above stated, there is submitted together with the merger proposal to the shareholders, a proposed amendment to the stock option plan of the company which is summarized in the proxy statement (Exhibit A hereto attached, pp. 16, 17). Under the proposed amendment to the stock option plan it is proposed to increase from 100,000 to 250,000 the aggregate number of shares with respect to which common stock may be granted and to increase from 20,000 to 25,000 the maximum number of shares with respect to which options may be granted to any one person. In addition to the option to be granted to Mr. Rojzman of 25,000 shares upon the merger becoming effective, an option shall also be granted to defendant William Grede, the right to purchase 25,000 shares and to defendant W. G. Brown an option to purchase 19,000 shares. On the basis of the showing of the company in the last three years the proposed amendment to the stock option plan whereby certain defendants are to receive stock options, is further evidence of the failure of defendant officers to properly protect the interests of the common stockholders. The proposed amendment to the stock option plan is part and parcel of the merger plan and suffers from all of the defects of the merger plan.

20. The defendant officers and directors, in fixing the consideration received by Case from ATC shareholders for shares of ATC to be issued to ATC shareholders, also violated the provisions of Section 180.15 of the Wisconsin Business Corporation Law, as amended, in that the payment for such shares is not to be "in whole or in part, in [fol. 26] money, in other property, tangible or intangible, or in labor or services, actually performed for the corporation", as more fully set forth in paragraph 17 hereof.

21. Pursuant to the plan of merger described in Exhibit A attached, a Special Meeting of the Stockholders of Case was called to be held at the principal office of the company at Racine, Wisconsin, November 15, 1956 at 12:00 noon, C.S.T. If, at such Special Meeting of Stockholders, the plan receives the affirmative vote of the holders of at least two-thirds of the outstanding shares of each class of shares entitled to vote as a class thereon, and of the total outstanding shares, the officers would thereby be authorized to execute the Articles of Merger and such merger would become effective under the laws of the State of Wisconsin upon issuance of Certificate of Merger by the Secretary of State, which he is authorized to do upon receiving the certificate and the due recording thereof. Pursuant to the call of the Special Meeting of Stockholders, notices have been sent to shareholders and proxies solicited by management. A copy of such proxy in the form prepared by management is hereto attached as Exhibit B. As shown hereinabove, the proxy statement (Exhibit A hereto attached) fails to properly and fully inform shareholders of important facts relating to the wisdom or soundness of the proposed merger plan and makes affirmative statements which are incorrect and may mislead shareholders. Accordingly, any proxies received by management pursuant to solicitation of management are illegal and should be declared void by the Court.

22. The holders of 7% cumulative preferred stock will not be substantially affected by the plan of merger. Certain of the holders of common stock, including the defendant officers and persons affiliated with them, will not be adversely affected by the proposed plan of merger but on the contrary may gain thereby. Plaintiff and other holders of common stock of Case similarly situated to plaintiff will be severely and irreparably damaged if the proposed plan of merger herein described is consummated.

23. Plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays the court:

I. To decree and declare that the plan of merger described in Exhibit A is illegal and void and any action taken pursuant thereto is illegal and void.

II. That the defendants, their agents and employes and each of them, be restrained and enjoined, during the pendency of this litigation and permanently from taking any further action to consummate the plan of merger described herein.

III. For such other and further relief as appears proper.

Bruno V. Bitker, Alex Elson, Arnold I. Shure, Attorneys for Plaintiff.

Bruno V. Bitker, 208 East Wisconsin Avenue, Milwaukee, Wisconsin.

Alex Elson, 11 South LaSalle Street, Chicago 3, Illinois.

Arnold I. Shure, 11 South LaSalle Street, Chicago 3, Illinois.

[fol. 28] *Duly sworn to by Carl H. Borak, jurat omitted in printing.*



J. I. CASE COMPANY

RACINE, Wis. U.S.A.

October 15, 1956

To the Stockholders of J. I. Case Company:

An important step toward desirable diversification by J. I. Case Company is presented to you in the attached proxy material and proposal to merge the American Tractor Corporation of Churubusco (Ft. Wayne) Indiana into J. I. Case Company.

The American Tractor Corporation manufactures an extensive line of light and medium sized crawler tractors and earth moving equipment, none of which duplicates anything the Case Company makes.

The Case Company's business is largely dependent upon the farm market. Diversification into the construction, earth moving and road building fields broadens the base of our product line and extends our market into this area. Therefore, this merger offers an immediate increase in volume and good growth potential.

The American Tractor Corporation has grown very rapidly in the last three years, its volume of net sales increasing from \$2,264,000 in fiscal 1954 to \$5,280,000 in 1955 and an estimated \$10,250,000 in 1956. For this expanding volume it urgently needs additional plant facilities such as we have.

The merger will enable us to utilize our manufacturing facilities, some of which are now idle, in producing for this growing volume as well as in making many parts and components which American Tractor Corporation now obtains from outside sources. It is planned that the Burlington, Iowa, plant of Case, where manufacturing operations have been almost completely suspended, will be used to manufacture some sizes of crawler tractors and equipment and certain sizes of engines will be manufactured at the Rock Island, Illinois, plant. Other parts and components will be produced and manufactured at other Case plants where manufacturing operations are at a low ebb.

The existing branch and farm dealer organization of Case is capable of marketing the American Tractor Corporation's products. This will add to American Tractor's present distribution by providing new selling outlets and will provide Case dealers with a broader line of equipment, strengthening their position and opening up new opportunities for profitable operations. In the export market the Case Company's well established distribution outlets are in a good position to market American Tractor's products and in most countries trade barriers and restrictions are less drastic on this type of equipment than they are on farm machinery.

The American Tractor Corporation's organization, which will come to Case as a result of

[fol. 29]

EXHIBIT A TO COMPLAINT

October 15, 1956

To the Stockholders of J. I. Case Company:

An important step toward desirable diversification by J. I. Case Company is presented to you in the attached proxy material and proposal to merge the American Tractor Corporation of Churubusco (Ft. Wayne) Indiana into J. I. Case Company.

The American Tractor Corporation manufactures an extensive line of light and medium sized crawler tractors and earth moving equipment, none of which duplicates anything the Case Company makes.

The Case Company's business is largely dependent upon the farm market. Diversification into the construction, earth moving and road building fields broadens the base of our product line and extends our market into this area. Therefore, this merger offers an immediate increase in volume and good growth potential.

The American Tractor Corporation has grown very rapidly in the last three years, its volume of net sales increasing from \$2,264,000 in fiscal 1954 to \$5,280,000 in 1955 and an estimated \$10,250,000 in 1956. For this expanding volume it urgently needs additional plant facilities such as we have.

The merger will enable us to utilize our manufacturing facilities, some of which are now idle, in producing for this growing volume as well as in making many parts and components which American Tractor Corporation now obtains from outside sources. It is planned that the Burlington, Iowa, plant of Case, where manufacturing operations have been almost completely suspended, will be used to manufacture some sizes of crawler tractors and equipment and certain sizes of engines will be manufactured at the Rock Island, Illinois, plant. Other parts and components will be produced and manufactured at other Case plants where manufacturing operations are at a low ebb.

The existing branch and farm dealer organization of Case is capable of marketing the American Tractor Corporation's products. This will add to American Tractor's present distribution by providing new selling outlets and will provide Case dealers with a broader line of equipment, strengthening their position and opening up new opportunities for profitable operations. In the export market the Case Company's well established distribution outlets are in a good position to market American Tractor's products and in most countries trade barriers and restrictions are less drastic on this type of equipment than they are on farm machinery.

The American Tractor Corporation's organization, which will come to Case as a result of the merger, is thoroughly experienced in the field and has demonstrated its ability successfully to engineer, produce and market this type of equipment.

[fol. 29]

EXHIBIT A TO COMPLAINT

During negotiations the representatives of the Case Company were favorably impressed by Mr. Rojzman and developed a high regard for his accomplishments and his organization. Upon approval of the merger, Mr. Rojzman and two of his associates will become directors of the Case Company and Mr. Rojzman will be appointed Executive Vice President and General Manager, with responsibility for and authority over the general management of the business affairs of Case.

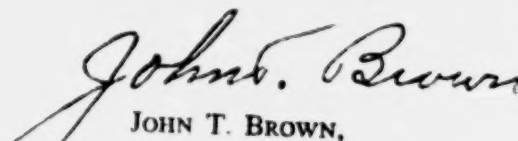
In order to meet competition in attracting and holding able executive and administrative personnel, it is proposed to make wider use of the Case Company stock option plan. Therefore, the stockholders are asked to approve its expansion as set forth in the accompanying proxy material.

When the personnel of the two organizations is integrated we shall have a management team equipped to handle this broad step in expansion and diversification and open up new opportunities for progress.

Case will issue pursuant to the merger for each outstanding share of Common Stock of American Tractor, one-half share of Case Common Stock and one share of new 6½ % Second Cumulative Preferred Stock, \$7 par value, of Case. Based on the outstanding capital stock of American Tractor as of July 31, 1956, Case will issue: 553,852 shares of Common Stock, with an aggregate market value of approximately \$7,961,623 as of September 24, 1956, the date the Case Board approved the merger; and 1,107,704 shares of new 6½ % Preferred Stock, with an aggregate par value of \$7,753,928. Case will also pay American Tractor \$2,362,500 to enable American Tractor to redeem its outstanding Preferred Stock. The aggregate market value as of September 24, 1956 of the Common Stock of American Tractor outstanding on July 31, 1956 was \$13,984,763. The aggregate redemption price of the outstanding American Tractor Preferred Stock, including the 50,000 shares purchased by Case, is \$2,362,500. The net book worth of American Tractor as of July 31, 1956, adjusted to reflect the subsequent issue of the 50,000 shares of American Tractor Preferred Stock to Case for \$1,000,000, was \$3,525,653. The Board of Directors of Case is of the opinion that the foregoing arrangements reflect a fair price for Case for the acquisition of a going concern such as American Tractor. It should be stressed that the development of a line of products comparable to the American Tractor line would require several years of time and the expenditure of millions of dollars before we could reach the manufacturing and market position occupied by American Tractor Corporation. From the foregoing figures it is evident that we are not buying bricks and mortar or inventory. Rather we are acquiring a developed product, a developed market and a situation which, in the judgment of your Board of Directors, holds great promise for the future.

After careful study and analysis of what the merger will do for the stockholders of the Case Company, the Board of Directors unanimously approved it and strongly recommends that you vote in favor of these proposals.

Respectfully yours,


JOHN T. BROWN,

[fol. 30]

Company and Mr. Rojzman will be appointed Executive Vice President and General Manager, with responsibility for and authority over the general management of the business affairs of Case.

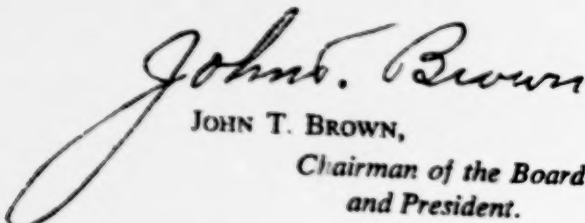
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When the personnel of the two organizations is integrated we shall have a management team equipped to handle this broad step in expansion and diversification and open up new opportunities for progress.

Case will issue pursuant to the merger for each outstanding share of Common Stock of American Tractor, one-half share of Case Common Stock and one share of new 6½ % Second Cumulative Preferred Stock, \$7 par value, of Case. Based on the outstanding capital stock of American Tractor as of July 31, 1956, Case will issue: 553,852 shares of Common Stock, with an aggregate market value of approximately \$7,961,623 as of September 24, 1956, the date the Case Board approved the merger; and 1,107,704 shares of new 6½ % Preferred Stock, with an aggregate par value of \$7,753,928. Case will also pay American Tractor \$2,362,500 to enable American Tractor to redeem its outstanding Preferred Stock. The aggregate market value as of September 24, 1956 of the Common Stock of American Tractor outstanding on July 31, 1956 was \$13,984,763. The aggregate redemption price of the outstanding American Tractor Preferred Stock, including the 50,000 shares purchased by Case, is \$2,362,500. The net book worth of American Tractor as of July 31, 1956, adjusted to reflect the subsequent issue of the 50,000 shares of American Tractor Preferred Stock to Case for \$1,000,000, was \$3,525,653. The Board of Directors of Case is of the opinion that the foregoing arrangements reflect a fair price for Case for the acquisition of a going concern such as American Tractor. It should be stressed that the development of a line of products comparable to the American Tractor line would require several years of time and the expenditure of millions of dollars before we could reach the manufacturing and market position occupied by American Tractor Corporation. From the foregoing figures it is evident that we are not buying bricks and mortar or inventory. Rather we are acquiring a developed product, a developed market and a situation which, in the judgment of your Board of Directors, holds great promise for the future.

After careful study and analysis of what the merger will do for the stockholders of the Case Company, the Board of Directors unanimously approved it and strongly recommends that you vote in favor of these proposals.

Respectfully yours,


JOHN T. BROWN,
Chairman of the Board
and President.

**NOTICE OF SPECIAL MEETING OF STOCKHOLDERS
TO BE HELD NOVEMBER 15, 1956**

NOTICE IS HEREBY GIVEN that a Special Meeting of the stockholders of J. I. CASE COMPANY will be held at the principal executive office of the Company in Racine, Wisconsin on Thursday, November 15th, 1956, at 12:00 o'clock noon, Central Standard Time, to transact the following business:

1. To consider and take action upon a plan of merger of American Tractor Corporation, a New York corporation, into the Company, as summarized in the Proxy Statement accompanying this notice and as set forth in Exhibit A thereto.
2. To consider and take action upon an amendment of the Stock Option Plan of the Company, as summarized in the Proxy Statement accompanying this notice.
3. To transact such other business as may properly come before the meeting.

The Board of Directors has fixed October 16, 1956 as the record date for the determination of the stockholders of the Company entitled to notice of and to vote at the Special Meeting.

Any holder of Common Stock or Preferred Stock of Case desiring to be paid the fair value of his shares must file a written objection to the plan of merger at least 48 hours prior to the stockholders' meeting, as more fully set forth under the heading "Rights of Dissenting Stockholders" in the Proxy Statement accompanying this notice.

By Order of the Board of Directors,

L. T. NEWMAN,
Secretary.

Dated: October 15, 1956

The favorable vote of two-thirds of the outstanding Common Stock and two-thirds of the outstanding Preferred Stock of the Company, each voting as a class, is required for approval of the proposed merger. Accordingly, if you are unable to attend the meeting please sign and date the accompanying proxy and mail it promptly in the enclosed envelope.

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J. I. CASE COMPANY

PROXY STATEMENT

This statement is furnished in connection with the solicitation by the management of J. I. Case Company ("Case") of proxies to be voted at the special meeting of stockholders scheduled to be held November 15, 1956. The Board of Directors of Case has fixed October 16, 1956 as the record date for the determination of the stockholders of Case entitled to notice of and to vote at the special meeting. The matters to be considered and acted upon at such meeting are the merger of American Tractor Corporation ("ATC") into Case and amendment of the Case Stock Option Plan. A person giving a proxy has the power to revoke it at any time prior to the exercise thereof.

I. Proposed Merger of American Tractor Corporation into J. I. Case Company

The Boards of Directors of Case and ATC have approved a plan of merger of ATC into Case, with the latter to be the surviving corporation. The plan of merger is summarized herein and is set forth in the Articles of Merger and Certificate of Consolidation, annexed hereto as Exhibit A, which provide for the merger under the laws of Wisconsin and the consolidation under the laws of New York (hereinafter called "merger") of ATC, a New York corporation, into and with Case, a Wisconsin corporation. Your Board recommends approval of such merger. The reasons which have motivated your Board in making such recommendation as being in the best interests of the stockholders of Case are set forth in the accompanying letter from John T. Brown, Chairman of the Board and President of Case.

Capital Stock of Case and ATC

The capitalization of Case and ATC is set forth below. Case has two classes of authorized stock as follows:

(a) 4,000,000 shares of Common Stock, par value \$12.50 a share, of which 2,262,766 shares were outstanding as of October 1, 1956. As of such date 26,400 shares of authorized Common Stock were reserved against outstanding stock options.

(b) 101,825 shares of 7% Cumulative Preferred Stock, par value \$100 a share, of which 92,906 shares were outstanding as of October 1, 1956.

ATC has two classes of authorized stock as follows:

(a) 2,000,000 shares of Common Stock, par value 25¢ a share, of which 1,108,944 shares were outstanding as of October 1, 1956. As of such date 9,547 shares of authorized Common Stock were reserved against outstanding stock options; 137,500 shares against conversions of Convertible Preferred Stock; and 180,000 shares against exercise of outstanding stock purchase warrants. In addition 2,000 shares of Common Stock were issued on October 12, 1956 to Mr. David Milligan, Vice President in Charge of Sales of ATC, pursuant to his employment contract with ATC.

(b) 250,000 shares of Convertible Preferred Stock, par value \$20 a share, of which the following shares were outstanding as of October 1, 1956: 12,500 shares of Con.

[fol. 33]

This statement is furnished in connection with the solicitation by the management of J. I. Case Company ("Case") of proxies to be voted at the special meeting of stockholders scheduled to be held November 15, 1956. The Board of Directors of Case has fixed October 16, 1956 as the record date for the determination of the stockholders of Case entitled to notice of and to vote at the special meeting. The matters to be considered and acted upon at such meeting are the merger of American Tractor Corporation ("ATC") into Case and amendment of the Case Stock Option Plan. A person giving a proxy has the power to revoke it at any time prior to the exercise thereof.

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(b) 101,825 shares of 7% Cumulative Preferred Stock, par value \$100 a share, of which 92,906 shares were outstanding as of October 1, 1956.

ATC has two classes of authorized stock as follows:

(a) 2,000,000 shares of Common Stock, par value 25¢ a share, of which 1,108,944 shares were outstanding as of October 1, 1956. As of such date 9,547 shares of authorized Common Stock were reserved against outstanding stock options; 137,500 shares against conversions of Convertible Preferred Stock; and 180,000 shares against exercise of outstanding stock purchase warrants. In addition 2,000 shares of Common Stock were issued on October 12, 1956 to Mr. David Milligan, Vice President in Charge of Sales of ATC, pursuant to his employment contract with ATC.

(b) 250,000 shares of Convertible Preferred Stock, par value \$20 a share, of which the following shares were outstanding as of October 1, 1956: 12,500 shares of Convertible Preferred Stock, Series 55-1; 50,000 shares of Convertible Preferred Stock, Series

[fol. 33]

56-1; and 50,000 shares of Convertible Preferred Stock, Series 56-2. Shares of Convertible Preferred Stock are convertible into shares of Common Stock at a price of \$20 per share of Common Stock in the case of Series 55-1 and at a price of \$16 per share of Common Stock in the case of Series 56-1 and 56-2.

Plan of Merger

Stock Conversion on Proposed Merger

Under the plan of merger the authorized capital stock of Case will remain the same except for the authorization of 1,300,000 shares of 6½ % Second Cumulative Preferred Stock, par value \$7 a share. Each share of Common Stock of ATC will be converted into (i) one-half share of Common Stock of Case and (ii) one share of new 6½ % Second Cumulative Preferred Stock of Case. Shares of Common Stock and 7% Cumulative Preferred Stock of Case outstanding on the effective date of the merger will not be affected as a result of the merger and will remain outstanding as shares of Case, the surviving corporation. As indicated below, all shares of ATC Convertible Preferred Stock not converted prior to the merger will be redeemed by ATC prior to the merger's effectiveness.

Purchase of ATC Convertible Preferred Stock and Stock Purchase Warrants by Case

On September 24, 1956 Case purchased 50,000 shares of ATC Convertible Preferred Stock, Series 56-2 at a price of \$20 a share, or an aggregate of \$1,000,000. In the event the merger is consummated, such ATC shares will be redeemed prior to the effective date of the merger. Case also purchased for \$500 on such date stock purchase warrants entitling the holder to purchase an aggregate of 90,000 shares of ATC Common Stock at \$16 a share until September 24, 1959. If the merger is consummated, such warrants will terminate on the effective date of the merger. Such shares and warrants were purchased by Case to provide ATC with working capital pending the effectiveness or abandonment of the merger. Case has agreed not to sell or otherwise dispose of such shares or warrants prior to such effectiveness or abandonment.

Redemption of ATC Convertible Preferred Stock in Event of Merger

The plan of merger provides that prior to its effectiveness all outstanding shares of Convertible Preferred Stock of ATC (including the 50,000 shares of Convertible Preferred Stock, Series 56-2 held by Case) will be redeemed at a price of \$21 a share. Case has agreed that in the event the merger is approved by stockholders and is not abandoned (see the caption "Abandonment of the Merger" herein) it will, before the effectiveness of the merger, provide sufficient funds to enable ATC to redeem all its ATC Convertible Preferred Stock then outstanding. Based on the assumption that 112,500 shares of ATC Convertible Preferred Stock remain outstanding, Case would be required to provide \$2,362,500 for such redemption, of which Case would receive \$1,050,000 on the redemption of the 50,000 shares of ATC Convertible Preferred Stock, Series 56-2 held by Case.

Options and Warrants to Purchase ATC Common Stock

As of October 1, 1956 there were outstanding options to purchase an aggregate of 9,547 shares of Common Stock of ATC. To the extent not exercised such options will terminate upon effectiveness of the merger.

As of October 1, 1956 there were also outstanding stock purchase warrants to purchase an aggregate of 180,000 shares of Common Stock of ATC (including the warrants to purchase

Plan of Merger

Stock Conversion on Proposed Merger

Under the plan of merger the authorized capital stock of Case will remain the same except for the authorization of 1,300,000 shares of 6½ % Second Cumulative Preferred Stock, par value \$7 a share. Each share of Common Stock of ATC will be converted into (i) one-half share of Common Stock of Case and (ii) one share of new 6½ % Second Cumulative Preferred Stock of Case. Shares of Common Stock and 7% Cumulative Preferred Stock of Case outstanding on the effective date of the merger will not be affected as a result of the merger and will remain outstanding as shares of Case, the surviving corporation. As indicated below, all shares of ATC Convertible Preferred Stock not converted prior to the merger will be redeemed by ATC prior to the merger's effectiveness.

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Redemption of ATC Convertible Preferred Stock in Event of Merger

The plan of merger provides that prior to its effectiveness all outstanding shares of Convertible Preferred Stock of ATC (including the 50,000 shares of Convertible Preferred Stock, Series 56-2 held by Case) will be redeemed at a price of \$21 a share. Case has agreed that in the event the merger is approved by stockholders and is not abandoned (see the caption "Abandonment of the Merger" herein) it will, before the effectiveness of the merger, provide sufficient funds to enable ATC to redeem all its ATC Convertible Preferred Stock then outstanding. Based on the assumption that 112,500 shares of ATC Convertible Preferred Stock remain outstanding, Case would be required to provide \$2,362,500 for such redemption, of which Case would receive \$1,050,000 on the redemption of the 50,000 shares of ATC Convertible Preferred Stock, Series 56-2 held by Case.

Options and Warrants to Purchase ATC Common Stock

As of October 1, 1956 there were outstanding options to purchase an aggregate of 9,547 shares of Common Stock of ATC. To the extent not exercised such options will terminate upon effectiveness of the merger.

As of October 1, 1956 there were also outstanding stock purchase warrants to purchase an aggregate of 180,000 shares of Common Stock of ATC (including the warrants to purchase 90,000 shares held by Case) at \$16 per share. The warrants held by Case are exercisable up to September 24, 1959 and the balance are exercisable up to February 2, 1959. Under the terms of the plan of merger, the warrants held by Case will terminate on the effectiveness of the merger,

[fol. 34]

but holders of the remaining warrants to purchase 90,000 shares of ATC Common Stock shall be entitled to purchase up to February 2, 1959 at the price of \$16 per share of ATC Common Stock the number of shares of Common Stock and 6½ % Second Cumulative Preferred Stock of Case to which they would have been entitled had they exercised their warrants to purchase shares of ATC Common Stock and held such shares at the date of merger. No fractional shares of Case will be issued on exercise of such warrants, but in lieu thereof cash payments will be made or scrip issued as determined by the Board of Directors of Case.

Capitalization of ATC, Case and the Surviving Company

The following table shows as of July 31, 1956 the long-term debt and capital stock of ATC, of Case, and, pro forma, of Case as the surviving corporation as if the merger had been in effect. In addition to the shares shown below, 3,353 shares of Common Stock of ATC were issued after July 31, 1956 pursuant to employment contracts and the exercise of stock options. Additional shares of Common Stock of ATC may be issued before the effectiveness of the merger in the event of the exercise of outstanding ATC stock purchase warrants or stock options or the conversion of outstanding shares of ATC Convertible Preferred Stock, Series 55-1 and 56-1. Pursuant to the merger additional shares of 6½ % Second Cumulative Preferred Stock and Common Stock of Case will be issued in respect of all shares of Common Stock of ATC issued after July 31, 1956.

	<u>ATC</u>	<u>Before Merger</u>	<u>After Merger</u>
Long-Term Debt	\$ 801,000	\$25,000,000	\$25,801,000
Capital Stocks			
ATC			
Convertible Preferred Stock			
(\$20 par value)			
Series 55-1	\$ 250,000	—	—
	(12,500 shs.)		
Series 56-1	\$1,000,000	—	—
	(50,000 shs.)		
Series 56-2(1)	—	—	—
Common Stock (25¢ par			
value)	\$ 276,926	—	—
	(1,107,704 shs.)		
Case			
7% Cumulative Preferred			
Stock (\$100 par value)	—	\$ 9,290,600	\$ 9,290,600
		(92,906 shs.)	(92,906 shs.)
6½ % Second Cumulative			
Preferred Stock (\$7 par			
value)	—	—	\$ 7,753,928
			(1,107,704 shs.)
Common Stock (\$12.50 par			
value)	—	\$28,284,575	\$35,207,725
		(2,262,766 shs.)	(2,816,618 shs.)

Capitalization of ATC, Case and the Surviving Company

The following table shows as of July 31, 1956 the long-term debt and capital stock of ATC, of Case, and, pro forma, of Case as the surviving corporation as if the merger had been in effect. In addition to the shares shown below, 3,353 shares of Common Stock of ATC were issued after July 31, 1956 pursuant to employment contracts and the exercise of stock options. Additional shares of Common Stock of ATC may be issued before the effectiveness of the merger in the event of the exercise of outstanding ATC stock purchase warrants or stock options or the conversion of outstanding shares of ATC Convertible Preferred Stock, Series 55-1 and 56-1. Pursuant to the merger additional shares of 6½% Second Cumulative Preferred Stock and Common Stock of Case will be issued in respect of all shares of Common Stock of ATC issued after July 31, 1956.

	ATC	Case	
		Before Merger	After Merger
Long-Term Debt	\$ 801,000	\$25,000,000	\$25,801,000
Capital Stocks			
ATC			
Convertible Preferred Stock			
(\$20 par value)			
Series 55-1	\$ 250,000	—	—
	(12,500 shs.)		
Series 56-1	\$1,000,000	—	—
	(50,000 shs.)		
Series 56-2(1)	—	—	—
Common Stock (25¢ par			
value)	\$ 276,926	—	—
	(1,107,704 shs.)		
Case			
7% Cumulative Preferred			
Stock (\$100 par value) ...	—	\$ 9,290,600	\$ 9,290,600
		(92,906 shs.)	(92,906 shs.)
6½% Second Cumulative			
Preferred Stock (\$7 par			
value)	—	—	\$ 7,753,928
			(1,107,704 shs.)
Common Stock (\$12.50 par			
value)	—	\$28,284,575	\$35,207,725
		(2,262,766 shs.)	(2,816,618 shs.)

(1) On September 24, 1956, Case purchased 50,000 shares of Convertible Preferred Stock, Series 56-2 of ATC. If the merger is consummated, these shares, as well as any shares of the other Series of Convertible Preferred Stock of ATC not converted prior to the merger, will be redeemed prior to the merger's effectiveness.

[Fol. 35]

Stockholder Vote Required for the Merger

Adoption of the merger requires the favorable vote of two-thirds of the outstanding shares of Common Stock and two-thirds of the outstanding shares of 7% Cumulative Preferred Stock of Case, each voting as a class. The proposed merger must also be approved by the favorable vote of two-thirds of the outstanding shares of Common Stock of ATC. In view of the proposed redemption of ATC Convertible Preferred Stock pursuant to the plan of merger, holders thereof are not entitled under the provisions of the certificate of incorporation of ATC to vote on the merger.

Effectiveness of Merger and Exchange of Certificates

The merger will become effective upon the filing and recording of the Articles of Merger and Certificate of Consolidation with the proper authorities in the States of Wisconsin and New York. Holders of certificates for Common Stock of ATC may thereafter exchange such certificates for certificates representing the appropriate number of whole shares of Common Stock and 6½ % Second Cumulative Preferred Stock of Case. Dividends payable on shares of capital stock of Case which are represented by certificates of Common Stock of ATC will be paid only upon the surrender of such certificates for exchange.

Fractional Shares

No half shares of Common Stock of Case will be issued pursuant to the merger, but in lieu thereof Case at its election will either (a) pay \$7.00 in cash or (b) deliver non-voting and non-dividend bearing scrip certificates (exchangeable within such period as may be fixed by the Board of Directors, upon surrender thereof with other scrip certificates aggregating one or more full shares, for the number of full shares represented).

Stock Exchange Listing

The Common Stock and the 7% Cumulative Preferred Stock of Case are listed on the New York Stock Exchange and the Common Stock of ATC is listed on the American Stock Exchange. Application will be made to list on the New York Stock Exchange, subject to the merger becoming effective, all shares of 6½ % Second Cumulative Preferred Stock and Common Stock of Case to be issued upon the merger. The listing on the American Stock Exchange of the Common Stock of ATC will be discontinued upon the merger becoming effective.

Comparative Financial and Accounting Information

Summaries of Sales and Earnings

The following summary of sales and earnings of J. I. Case Company, insofar as it relates to the ten years ended October 31, 1955, has been examined by Price Waterhouse & Co., independent public accountants, whose opinion thereon appears elsewhere in this proxy statement; and the following summary of sales and earnings of American Tractor Corporation insofar as it relates to the five fiscal periods from January 1, 1951 to August 31, 1955 has been examined by Detmer, Lipp & Company, independent public accountants, whose opinion thereon appears elsewhere in this proxy statement. The information set forth as to Case for the nine months ended July 31, 1956 and July 31, 1955 and as to ATC for the eleven months ended July 31, 1956 has been prepared by the respective companies and has not been audited. Such information for the unaudited interim periods includes all adjustments known to the companies which are necessary for a fair statement of the results for such periods. The summaries, insofar as they relate to the three years and nine months ended July 31, 1956 for Case and the four fiscal periods and eleven months ended July 31, 1956 for ATC, should be read in conjunction with the financial statements and notes thereto included elsewhere in this proxy statement.

J. I. CASE COMPANY Summary of Sales and Earnings

Fiscal Year Ended October 31	(000 Omitted)				Net Earnings or (Loss)	Net Earnings or (Loss) Applicable to Common Stock	Per Share of Common Stock, Par Value \$12.50 (1)	
	Net Sales	Gross Profit	Interest Expense	Provision for Federal, State and Foreign Taxes on Income			Net Earnings or (Loss)	Dividends Paid
1946(2)	\$ 35,488	\$ 3,898	\$ --	\$(1,882)(3)	\$ 1,483	\$ 833	\$.54	\$1.00
1947(2)	75,304	13,326	31	3,195	4,916	4,266	2.75	.80
1948	142,432	25,822	145	8,135	10,377	9,727	6.27	1.00
1949	156,007	38,598	109	12,400	17,607	16,957	9.93	1.00
1950	132,696	35,503	196	12,800(4)	15,136	14,486	8.48	2.525
1951	153,545	34,282	421	13,525	9,786(5)	9,136	4.86	2.50
1952	142,898	27,591	1,395	8,150	7,049	6,399	2.82	2.50
1953	104,463	14,549	1,700	850	781	131	.06	2.00
1954	87,112	11,380	1,514	(455)	(549)	(1,199)	(.53)	.50
1955	88,894	14,369	1,436	767	903	253(6)	.11	—
Nine months ended July 31, 1955 (un-audited)	68,009	9,433	1,104	28	25	(463)	(.20)	—
1956 (un-audited)	59,612	4,852	1,256	(700)	(3,703)	(4,191)	(1.85)	—

() Indicates negative figure.

NOTES:

- (1) Based on shares of Common Stock outstanding at the end of the respective periods, adjusted to give effect to the 2 for 1 stock split on April 17, 1952 but without retroactive adjustment for 10% stock dividends paid in the fiscal years 1949 and 1951 respectively.
- (2) Operations for the years 1946 and 1947 were adversely affected because of curtailment of production at Case's plants due to strikes.
- (3) Comprises \$1,000,000 payment of refund of prior years' federal taxes on income arising from operations of

[fol. 37]

production in 1956 and its products transferred to other Case facilities. Case is presently terminating operations at the Anniston plant and intends to terminate operations at Stockton early in 1957 in order to consolidate production at the other locations. Case presently plans to dispose of the Anniston plant. Operations at the other Case plants have been reduced considerably below capacity. The Case foundries are at Racine, Rockford and Rock Island. The Rock Island foundry is presently not operating but is maintained in a standby condition. The executive offices are at Racine.

Market for Agricultural Machinery

A large unfilled demand for farm machinery was built up during World War II, when severe restrictions were placed on manufacturers and the demand was further stimulated during the Korean War period. This resulted in a higher than normal demand for farm machinery which continued well into 1952. Beginning in the latter part of 1952 industry production caught up with demand and all types of farm machinery became readily available. In 1953 and subsequent years there has been a substantial decline in farm income causing a reduction in the sale of farm machinery. Cash farm income from crops and livestock in the United States and Government benefit payments, together with farmers' net income as estimated and reported by the Department of Agriculture are shown in the following table for the years indicated:

	Cash Farm Income	Government Payments	Total	Farmers' Net Income
	(in millions)			
1950	\$28,773	\$283	\$29,056	\$12,344
1951	32,800	283	33,083	14,299
1952	32,373	275	32,648	14,319
1953	31,200	247	31,447	12,747
1954	30,200	247	30,447	12,500
1955	29,264	229	29,493	11,340
1956 (estimated)	29,849	537	30,386	11,750

[fol. 40]

Many areas in the United States and Canada where Case normally obtains a substantial volume of business have experienced drought and unfavorable crop conditions adversely affecting farm machinery sales since 1953.

Case's net sales dropped from approximately \$153,000,000 in fiscal 1951 to approximately \$87,000,000 in fiscal 1954. Production was reduced during this period by about 55%. Inventories were reduced by about 40% during the period of the fiscal years 1951 through 1955. Net sales for fiscal 1955 increased to slightly less than \$89,000,000 and for the first nine months of fiscal 1956 net sales were slightly less than \$60,000,000.

Distribution System

Case sells its products at wholesale through its own branches in the United States and Canada to about 3,400 farm machinery dealers in the agricultural areas of those countries. These dealers are independent business firms which purchase and sell Case farm machinery and parts, and also render the mechanical service required. Case has 29 sales branches in the United States

and the following summary of sales and earnings of American Tractor Corporation insofar as it relates to the five fiscal periods from January 1, 1951 to August 31, 1955 has been examined by Detmer, Lipp & Company, independent public accountants, whose opinion thereon appears elsewhere in this proxy statement. The information set forth as to Case for the nine months ended July 31, 1956 and July 31, 1955 and as to ATC for the eleven months ended July 31, 1956 has been prepared by the respective companies and has not been audited. Such information for the unaudited interim periods includes all adjustments known to the companies which are necessary for a fair statement of the results for such periods. The summaries, insofar as they relate to the three years and nine months ended July 31, 1956 for Case and the four fiscal periods and eleven months ended July 31, 1956 for ATC, should be read in conjunction with the financial statements and notes thereto included elsewhere in this proxy statement.

J. I. CASE COMPANY Summary of Sales and Earnings

Fiscal Year Ended October 31	(000 Omitted)						Per Share of Common Stock, Par Value \$12.50 (1)	
	Net Sales	Gross Profit	Interest Expense	Provision for Federal, State and Foreign Taxes on Income	Net Earnings or (Loss)	Net Earnings or (Loss) Applicable to Common Stock	Net Earnings or (Loss)	Dividends Paid
1946(2)	\$ 35,488	\$ 3,898	\$ —	\$(1,882)(3)	\$ 1,483	\$ 833	\$.54	\$1.00
1947(2)	75,304	13,326	31	3,195	4,916	4,266	2.75	.80
1948	142,432	25,822	145	8,135	10,377	9,727	6.27	1.00
1949	156,007	38,598	109	12,400	17,607	16,957	9.93	1.00
1950	132,696	36,503	196	12,800(4)	15,136	14,486	8.48	2.525
1951	153,545	34,282	421	13,525	9,786(5)	9,136	4.86	2.50
1952	142,898	27,591	1,395	8,150	7,049	6,399	2.82	2.50
1953	104,463	14,549	1,700	850	781	131	.06	2.00
1954	87,112	11,380	1,514	(455)	(549)	(1,199)	(.53)	.50
1955	88,894	14,369	1,436	767	903	253(6)	.11	—
Nine months ended July 31, 1955 (un- audited)	68,009	9,433	1,104	28	25	(463)	(.20)	—
1956 (un- audited)	59,612	4,852	1,256	(700)	(3,703)	(4,191)	(1.85)	—

() Indicates negative figure.

NOTES:

- (1) Based on shares of Common Stock outstanding at the end of the respective periods, adjusted to give effect to the 2 for 1 stock split on April 17, 1952 but without retroactive adjustment for 10% stock dividends paid in the fiscal years 1949 and 1951 respectively.
- (2) Operations for the years 1946 and 1947 were adversely affected because of curtailment of production at Case's plants due to strikes.
- (3) Comprises \$1,900,000 estimated refund of prior years' federal taxes on income arising from carry-backs of operating loss for fiscal year and unused excess profits tax credit, less \$18,000 foreign income taxes.
- (4) Includes \$800,000 provision for federal excess profits tax.
- (5) As at November 1, 1950, Case changed its method of valuing its inventories from average cost or market, whichever lower, to cost determined on the basis of "last-in, first-out". The net earnings for 1951 are approximately \$1,250,000 less than if they had been reported on the old basis.
- (6) Does not include \$162,586 preferred dividend declared in 1955 representing dividend for first quarter 1956.

See the heading "Market for Agricultural Machinery" under the caption "Business of Case" as to reasons for the losses in the fiscal years 1954 and 1956 and the decline in sales in recent years.

If the merger with ATC is consummated the dividend requirements on the new 6½ % Second Cumulative Preferred Stock issuable on the effectiveness of the merger, based on the number of shares of Common Stock of ATC outstanding on July 31, 1956, will be \$504,005 per annum. This amount will be increased to the extent that additional shares of 6½ % Second Cumulative Preferred Stock are issued pursuant to the merger. In addition there will be further charges against earnings of (1) an amount, presently undeterminable, for amortization of excess of cost of assets acquired over assigned value thereof, as explained in note 5 on page 40, and (2) depreciation of approximately \$80,000 per year on the increased carrying value of property, plant and equipment of ATC.

AMERICAN TRACTOR CORPORATION

Summary of Sales and Earnings

(000 Omitted)								
Fiscal Period	Net Sales	Gross Profit	Interest Expense	Provision for Federal Taxes on Income	Net Earnings or (Loss)	Net Earnings or (Loss) Applicable to Common Stock	Per Share of Common Stock par Value 25¢ (3) — Net Earnings or (Loss)	Dividends Paid
Year ended December 31,								
1951	\$3,119	\$ 300	\$ 18	\$ 25	\$ 26	\$ 26	\$.03	—
1952	3,456	279	24	(25)(1)	(40)	(41)	(.05)	—
Eight months ended August 31,								
1953	1,702	157	15	—	(89)	(89)	(.09)	—
Year ended August 31,								
1954	2,264	270	32	—	(167)	(167)	(.16)	—
1955	5,280	1,101	62	69(2)	347	347	.32	—
Eleven months ended July 31,								
1956 (unaudited)	9,177	1,735	121	331	306	280	.25	—

() Indicates negative figure.

NOTES:

- (1) Refund of prior year's federal taxes on income arising from carry-back of operating loss for year.
- (2) The federal tax provision for the year ended August 31, 1955 is \$127,610 less than the tax normally applicable to net income for that year due to a net operating loss carry-over from prior periods.
- (3) Based on shares of Common Stock outstanding at the end of the respective periods, adjusted to give effect to 1,000 for 1 stock split in 1952 and 2 for 1 stock split in 1955, and after provision for preferred stock dividends paid.

Market Prices for Stocks of Case and ATC

The high and low sales prices (as reported by the Commercial and Financial Chronicle) of the Common Stock of Case on the New York Stock Exchange since January 1, 1946 and of the Common Stock of ATC on the American Stock Exchange following its listing on January 17, 1955 are set forth below.

	Case ¹		ATC ²	
	High	Low	High	Low
1946	27½	15¾		
1947	23½	14¾		
1948	26¼	17⅞		
1949	22¾	15		
1950	28⅞	17⅞		
1951	39¾	26		
1952	36½	22		
1953	25	14½		
1954 First Quarter	17½	14⅞		
Second Quarter	17¾	13⅞		
Third Quarter	16⅞	14½		
Fourth Quarter	19¾	14½		
1955 First Quarter	19¾	15½	9¾	6
Second Quarter	18¾	16¼	15	9½
Third Quarter	18¼	15½	14¾	12¾
Fourth Quarter	19½	13¾	17¾	13
1956 First Quarter	18½	14½	16¼	13¾
Second Quarter	15¾	11½	14¾	13½
Third Quarter	15¾	11¾	15	12½

(1) Adjusted to give effect to the 2-for-1 split of Case Common Stock on April 17, 1952 but without retroactive adjustment for 10% stock dividends in the fiscal years 1949 and 1951 respectively.

(2) Adjusted to give effect to the 2-for-1 split of ATC Common Stock on August 18, 1955.

There are no available quotations of the ATC Common Stock on the over-the-counter market prior to the third quarter of 1954. The low bid and high offer for such stock (as reported by The National Quotation Bureau Incorporated) during the third quarter of 1954 were 1½ and 2¾, respectively, and for the fourth quarter of 1954 were 3½ and 6¾, respectively.

On October 15, 1956 the closing price for Common Stock of Case on the New York Stock Exchange was 13¾ per share and the closing price for Common Stock of ATC on the American Stock Exchange was 11¾ per share.

General

Business of Case

Case, incorporated under the laws of Wisconsin in 1920 as J. I. Case Threshing Machine

	Case ¹		ATC ²	
	High	Low	High	Low
1946	27½	15¾		
1947	23½	14¾		
1948	26¼	17½ ₁₆		
1949	22¾	15		
1950	28½ ₁₆	17½ ₁₆		
1951	39¾	26		
1952	36½	22		
1953	25	14½		
1954 First Quarter	17½	14¾		
Second Quarter	17¾	13¾		
Third Quarter	16¾	14½		
Fourth Quarter	19¾	14½		
1955 First Quarter	19¾	15½	9¾	6
Second Quarter	18¾	16¼	15	9½
Third Quarter	18¼	15½	14¾	12¾
Fourth Quarter	19½	13¾	17¾	13
1956 First Quarter	18½	14½	16¼	13¾
Second Quarter	15¾	11½	14¾	13½
Third Quarter	15¾	11¾	15	12½

- (1) Adjusted to give effect to the 2-for-1 split of Case Common Stock on April 17, 1952 but without retroactive adjustment for 10% stock dividends in the fiscal years 1949 and 1951 respectively.
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Business of Case

General

Case, incorporated under the laws of Wisconsin in 1880 as J. I. Case Threshing Machine Company, is the successor to the farm machinery business established by Jerome I. Case in 1842. Its corporate title was changed in 1929 to J. I. Case Company.

Case is a full-line producer of farm machinery, including tractors and all of the equipment generally used in plowing, tilling, fertilizing, planting and seeding, cultivating, making hay

and silage and harvesting grains, seeds, corn and many other crops. In addition, wheel tractors and power engine units are produced and sold for non-farm use.

Case has 7 plants and 3 foundries in the United States. Plants are located at Racine, Wisconsin, at Rockford and Rock Island, Ill., at Bettendorf and Burlington, Iowa, at Anniston, Ala., and at Stockton, Calif. One plant formerly operated at Racine was substantially taken out of production in 1956 and its products transferred to other Case facilities. Case is presently terminating operations at the Anniston plant and intends to terminate operations at Stockton early in 1957 in order to consolidate production at the other locations. Case presently plans to dispose of the Anniston plant. Operations at the other Case plants have been reduced considerably below capacity. The Case foundries are at Racine, Rockford and Rock Island. The Rock Island foundry is presently not operating but is maintained in a standby condition. The executive offices are at Racine.

Market for Agricultural Machinery

A large unfilled demand for farm machinery was built up during World War II, when severe restrictions were placed on manufacturers and the demand was further stimulated during the Korean War period. This resulted in a higher than normal demand for farm machinery which continued well into 1952. Beginning in the latter part of 1952 industry production caught up with demand and all types of farm machinery became readily available. In 1953 and subsequent years there has been a substantial decline in farm income causing a reduction in the sale of farm machinery. Cash farm income from crops and livestock in the United States and Government benefit payments, together with farmers' net income as estimated and reported by the Department of Agriculture are shown in the following table for the years indicated:

	<u>Cash Farm Income</u>	<u>Government Payments</u>	<u>Total</u>	<u>Farmers' Net Income</u>
	(in millions)			
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1952.....	32,373	275	32,648	14,319
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1955.....	29,264	229	29,493	11,340
1956 (estimated).....	29,849	537	30,386	11,750

Many areas in the United States and Canada where Case normally obtains a substantial volume of business have experienced drought and unfavorable crop conditions adversely affecting farm machinery sales since 1953.

Case's net sales dropped from approximately \$153,000,000 in fiscal 1951 to approximately \$87,000,000 in fiscal 1954. Production was reduced during this period by about 55%. Inventories were reduced by about 40% during the period of the fiscal years 1951 through 1955. Net sales for fiscal 1955 increased to slightly less than \$89,000,000 and for the first nine months of fiscal 1956 net sales were slightly less than \$60,000,000.

Distribution System

Case sells its products at wholesale through its own branches in the United States and Canada

and 8 in Canada. Orders are submitted to the branches, which generally place them with the Case plants for direct shipment to the dealers, although the branches have warehouse facilities and maintain sufficient stocks of machinery and replacement parts for prompt shipment when required. Tractors and engine units for other than farm use are sold and serviced through a separate dealer organization which has sales representatives at principal points in the United States and Canada.

Case's export sales, outside of Canada, are handled both by direct sales to dealers in 65 countries and through 5 branches located in the Argentine, Uruguay and Brazil. During the past five years such export sales have accounted for between about 10% and 16% of Case's total sales and currently amount to about 10% of such total sales.

Subject to reasonable credit limitations, most sales to dealers are handled on the basis of payment due on varying dates, depending on the type of machinery sold, and with cash discounts for prepayment. It is Case's general policy to retain security title to or lien upon new goods in dealers' hands until payment is made therefor. Many dealers arrange for the wholesale financing of their purchases either through their local banks or other agencies, thus enabling them to take advantage of the cash discounts. Upon the dealer's sale of a machine, his obligation to Case becomes immediately due and payable, even though prior to the scheduled payment date. The total amount of receivables from dealers has increased steadily during the last five years. In addition Case finances dealers' retail sales by accepting farmers' receivables therefor.

Products

It has been Case's policy for many years to make quality products, and it has attained a high reputation in this regard. During the past five years Case has intensified its program of engineering and new product development.

New and improved machines have been included in the Case lines which have contributed to agricultural mechanization. These include the Case four-plow tractor, series "400", the new three-plow tractor, series "300", both available with gasoline, distillate, liquid petroleum gasoline and diesel power units, together with the related implements used by these tractors. In addition Case has introduced a self-propelled and pull-type combine, new light and heavy duty automatic tying hay balers using both wire and twine, new lister type press drills, a complete new line of manure spreaders, a heavy duty farm wagon, a new two-row mounted corn picker, an improved line of forage harvesters, the "A" series heavy duty moldboard plow, the "S" series wheel harrow, two-way reversible mounted moldboard and disk plows, the "M" series mowers, a new line of offset disk harrows, rotary cutters and the Model 88 tobacco harvester.

Included in Case's full line of agricultural machinery are wheel tractors and related implements, threshers, combines, planters and listers, cultivators, plows, harrows, grain drills, hay machinery (including mowers, rakes and balers), forage harvesters, corn pickers, hammer feed mills, manure spreaders, farm wagons, portable elevators, stalk shredders, cotton strippers, tobacco harvesters and sub-soilers. Many of these products are produced in various types, sizes and models. The individual machines in the order of their importance in dollar volume of Case's sales are wheel tractors, implements (both tractor drawn and mounted), combines, hay balers, forage harvesters and corn pickers. Case also manufactures and markets parts for the servicing and repair of its products.

Competition

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Competition

The farm machinery industry is highly competitive. A total of 1,240 manufacturers reported to the United States Bureau of the Census in 1954. There are eight companies, including Case, commonly referred to as full-line manufacturers, which means they make and sell a relatively complete line of farm machinery and equipment. Accurate figures on the sales of farm machinery

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by all of the eight full-line manufacturers are not available. However, Case believes its relative position is either fifth or sixth among such full-line manufacturers. The sales of each of the two largest full-line manufacturers are substantially larger than those of any other manufacturer, including Case. Besides the full-line companies, there are a great many short-line companies which manufacture and sell certain kinds of farm equipment and successfully compete with the full-line manufacturers on the machines they produce.

Materials and Supplies

Steel, pig iron, cast iron and steel scrap are the most important raw materials used by Case. Case produces or fabricates most of the parts entering into the manufacture of its products, the principal items it purchases from others being tires and tubes, rubber belts, tractor radiators, rims, bearings, chain, electrical equipment such as ammeters, speedometers, batteries and wiring equipment, disk blades for plows and harrows, and a portion of its engine requirements for balers, combines and forage harvesters. Case's sources for its materials and parts are competitive, and it is not limited to any one particular source for any materials or parts used in the manufacture of its products.

Case produces in its own foundries practically all of its requirements of grey iron castings, which are a major item in its operations. Case also makes substantially all of the engine requirements for its tractors and has produced at its Rock Island and Racine tractor plants a substantial part of the engine requirements for the larger models of combines and hay balers.

Employee Relations

As of October 1, 1956 Case had approximately 3,500 employees at its various plants, exclusive of supervisory and salaried personnel. Most of the production and maintenance employees are represented by the UAW-AFL-CIO with most of the remaining employees being represented by various craft unions.

The union contract at the Stockton, California, plant expired in May 1956 with no new agreement having been reached. Under Case's present plans operations at Stockton will terminate in early 1957. Negotiations are currently in progress with the union at the Rock Island plant under a wage reopening clause of the union contract. The union contracts at Case's plants expire on various dates, the earliest of which is January 1957, and contain in certain cases provisions for earlier reopening with respect to wages.

During the fiscal year 1956, Case put into effect hourly wage adjustments totaling approximately \$1,525,000 a year, of which approximately \$829,000 is reflected in the figures for the operations of Case for the nine months ended July 31, 1956.

Manufacturing Facilities

Case's manufacturing operations are carried out at seven plants as follows:

<u>Plant</u>	<u>Principal Products</u>
Racine, Wisconsin, Plant	Two sizes of tractors in various models and balers.
Rockford, Illinois, Plant	Plows, harrows, cultivators, planters, mowers, stalk shredders, and rakes and spreaders.
Rock Island, Illinois, Plant	Tractors, farm wagons and hammer feed mills.
Burlington, Iowa, Plant	Combines and grain elevators.

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Rock Island, Illinois, Plant	Tractors, farm wagons and hammer feed mills.
Burlington, Iowa, Plant	Combines and grain elevators.
Bettendorf, Iowa, Plant	Combines, hay balers, forage harvesters, windrowers, and corn pickers and picker-shellers.
Stockton, California, Plant	Harrows, rakes, cultivators and tool bar implements especially designed for use in the Pacific Coast area.
Anniston, Alabama, Plant	Plows, cultivators, rakes, cane tools and tobacco harvesters.

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Case's plants and physical facilities have been maintained in good condition and Case considers them adequate for their operations.

While production rates have varied between plants and between different seasons, Case estimates that during the current fiscal year the Case plants, taken in the aggregate, produced at an average rate of about 40% of capacity. As to the extent of operations at the various plants and plans for termination of operations at certain plants see the heading "General" under the caption "Business of Case".

Business of ATC

General

Case has been supplied with the information contained herein as to ATC by the management of ATC. ATC was founded in 1948 under the name Washington Tractor & Farm Equipment Corp. and changed its name in 1949 to American Tractor Corporation. Mr. Marc B. Rojzman, President of ATC, founded the company and has acted continuously as its President and principal executive officer.

In 1948 ATC commenced research and development work on a high clearance, lightweight, highly maneuverable crawler tractor. In 1950 ATC purchased from Federal Machine and Welder Company of Warren, Ohio, the manufacturer of the Ustrac crawler tractor, a substantial inventory of Ustrac and Clarkair tractor parts. In addition ATC acquired the use of all the engineering drawings, jigs, dies, fixtures and tooling of the Ustrac tractor at no additional cost to ATC. The Clarkair tractor, on which the Ustrac tractor was patterned, was originally developed by Clark Equipment Company of Battle Creek, Michigan, for United States airborne military requirements in World War II.

In 1950 ATC acquired a factory site at Churubusco, Indiana consisting of a frame building with a floor area of approximately 6,900 square feet. ATC engaged in a complete redesign program of the Ustrac tractor and by September 1950 introduced its first production model called the TerraTrac GT 25. This unit was 25 horsepower with application primarily in farming and light construction. This model is no longer in production. Beginning in 1951 ATC engaged in an extensive new product development and tooling program which by 1954 gave to ATC a line of five models of crawler tractors together with its own engineered and manufactured line of bulldozers, angledozers and other industrial and specialized equipment.

ATC's Products

The development program of ATC by the end of the 1956 fiscal year has resulted in an expanded product line consisting of five gasoline powered crawler tractors with horsepower ranging from 36½ to 62, three diesel powered crawler tractors with horsepower ranging from 37 up to 62, one 42.5 horsepower gasoline powered crawler fork lift, and two models of transport trailers together with a line of loaders ranging from one-half to one cubic yard capacity with bulldozers, angledozers, scarifiers and winches available for each of the separate models. In addition ATC designed and introduced in 1956 its own crawler-mounted backhoe, the only backhoe produced by any crawler tractor manufacturer specifically for use on its own tractors.

In 1956 ATC also introduced its own specially designed hydraulic "Terramatic" transmission which was incorporated in the 62 horsepower model 600 tractor. Although this model was enthusiastically received in the market, production was limited by the relatively short supply of Terramatic transmissions, with no such transmissions being delivered to ATC during the last half of June and the entire month of July 1956. Since August 1, 1956, ATC has been able to deliver the Terramatic transmission to its customers.

Business of ATC**General**

Case has been supplied with the information contained herein as to ATC by the management of ATC. ATC was founded in 1948 under the name Washington Tractor & Farm Equipment Corp. and changed its name in 1949 to American Tractor Corporation. Mr. Marc B. Rojzman, President of ATC, founded the company and has acted continuously as its President and principal executive officer.

In 1948 ATC commenced research and development work on a high clearance, lightweight, highly maneuverable crawler tractor. In 1950 ATC purchased from Federal Machine and Welder Company of Warren, Ohio, the manufacturer of the Ustrac crawler tractor, a substantial inventory of Ustrac and Clarkair tractor parts. In addition ATC acquired the use of all the engineering drawings, jigs, dies, fixtures and tooling of the Ustrac tractor at no additional cost to ATC. The Clarkair tractor, on which the Ustrac tractor was patterned, was originally developed by Clark Equipment Company of Battle Creek, Michigan, for United States airborne military requirements in World War II.

In 1950 ATC acquired a factory site at Churubusco, Indiana consisting of a frame building with a floor area of approximately 6,900 square feet. ATC engaged in a complete redesign program of the Ustrac tractor and by September 1950 introduced its first production model called the TerraTrac GT 25. This unit was 25 horsepower with application primarily in farming and light construction. This model is no longer in production. Beginning in 1951 ATC engaged in an extensive new product development and tooling program which by 1954 gave to ATC a line of five models of crawler tractors together with its own engineered and manufactured line of bulldozers, angledozers and other industrial and specialized equipment.

ATC's Products

The development program of ATC by the end of the 1956 fiscal year has resulted in an expanded product line consisting of five gasoline powered crawler tractors with horsepower ranging from 36½ to 62, three diesel powered crawler tractors with horsepower ranging from 37 up to 62, one 42.5 horsepower gasoline powered crawler fork lift, and two models of transport trailers together with a line of loaders ranging from one-half to one cubic yard capacity with bulldozers, angledozers, scarifiers and winches available for each of the separate models. In addition ATC designed and introduced in 1956 its own crawler-mounted backhoe, the only backhoe produced by any crawler tractor manufacturer specifically for use on its own tractors.

In 1956 ATC also introduced its own specially designed hydraulic "Terramatic" transmission which was incorporated in the 62 horsepower model 600 tractor. Although this model was enthusiastically received in the market, production was limited by the relatively short supply of Terramatic transmissions, with no such transmissions being delivered to ATC during the last half of June and the entire month of July, 1956. Since August 1, 1956, ATC has been able to obtain an improved supply of transmission units.

By December 1956 ATC's new 80 horsepower gasoline and diesel powered crawler tractors and its new 100 horsepower diesel tractor are scheduled to be released for sale. The company's additional models M-10 rear engine crawler tractor of 100 horsepower and its 120 horsepower

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diesel power crawler tractor are scheduled to be released during March, 1957. With the introduction of these larger models ATC will present a fully integrated line of equipment including loaders from $1\frac{1}{3}$ to $1\frac{3}{4}$ cubic yard capacity, hydraulic angledozers, bulldozers, scarifiers, winches and scrapers for heavy construction and road building work.

ATC will incorporate in its new higher horsepower tractors, beginning with the 80 horsepower model 800, a new feature, namely its specially designed counter-rotating hydraulic "Terramatic" transmission. This larger Terramatic transmission incorporates hydraulically operated automatic forward and reverse speeds, foot or manual controls, with faster reverse than forward speeds, and permits power turns and counter rotation.

Growth of ATC Sales and Earnings

Following the initial years the volume of ATC sales has rapidly increased. In each of the fiscal years 1955 and 1956 ATC's sales volume practically doubled that of the previous year, with sales being as follows: 1954—\$2,264,236; 1955—\$5,279,628; and 1956—\$10,250,000 (unaudited).

During such years ATC earnings also increased notwithstanding the cost of an extensive engineering and development program, including the recent program resulting in the development of its larger horsepower models to be introduced in fiscal 1957. Operations in 1954 resulted in a net loss of \$166,871. In the fiscal year 1955 net earnings before taxes amounted to \$416,102 and after taxes to \$346,781 and for the eleven months ended July 31, 1956 amounted to \$637,621 before taxes and \$306,211 after taxes (unaudited).

Markets and Applications for ATC Products

The markets and applications for ATC's products include housing and commercial construction such as shopping centers and industrial plants; road-building and heavy construction such as land leveling, grading, excavating and fill work on roads, building sites and land reclamation; municipality work such as sanitary landfill, sewer, pipe and water line installation and secondary road maintenance. Oil pipeline installation, logging, materials, handling in and around industrial plants, as well as specialized farming where rubber tired tractors are unsuitable, are among ATC's varied product applications. During 1956, ATC also completed, under contract with the U. S. Navy, production of a pilot model of electrically controlled crawler fork lift, with special hydraulic transmission, for shipboard materials handling. This unit is now undergoing tests by the Navy.

Distribution

In 1954 ATC had a distributor and dealer network composed of 43 outlets. By fiscal year-end 1956, ATC's domestic and foreign outlets had increased to 233. ATC's dealer and distributor organization includes agricultural and light construction machinery dealers located in rural areas and industrial and materials handling dealers located in cities and metropolitan areas. Included in ATC's distribution system are wholesale distributors who in turn sell and service retail dealers who sell ATC products and parts to end-users and also render the mechanical service required. Starting with only 10 such wholesale distributors in 1954, by the end of fiscal 1956 the number of distributors had risen to 38.

Most of ATC's sales to its distributors and industrial dealers are made under ATC's dis-

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Most of ATC's sales to its distributors and industrial dealers are made under ATC's distributors' floor plan arrangement under which title is retained by ATC until deferred payments have been made. Most sales to retail dealers are made under ATC's dealer floor plan arrangement under which ATC receives a title retention note from the dealer with the deferred installment payments being guaranteed by the distributor. All of such title retention instruments provide for immediate payment in the event of sale. ATC discounts a substantial portion of this paper with recourse with its banks. Subject to reasonable credit limitations sales are also made to distributors on 30 day open account.

Materials and Supplies

Steel is the most important raw material used by ATC. ATC purchases castings and forgings to its own specifications from various sources. ATC purchases from single sources of supply its torque converters and engines. ATC purchases its transmissions, other than its specially designed Terramatic transmission, from a single supplier. In the past it has also purchased its Terramatic transmission from a single supplier, but is now engaged in a program of purchasing from various sources the component parts for such Terramatic transmissions and by the end of October 1956 will be machining all housings and clutches and assembling its own Terramatic transmissions. ATC fabricates a substantial portion of the remaining materials and parts used in its products.

Competition

Crawler tractors are manufactured by a limited number of concerns, including a few who produce only a single model. In the sale of its six models of smaller crawler tractors ranging in size from 37 to 50 horsepower ATC experiences no material competition from the three largest crawler tractor manufacturers. Such competition arises principally from the limited lines of crawler tractors of two other manufacturers. ATC does not have reliable information as to the sales volume in the crawler tractor field of these two manufacturers but the total dollar sales of all products of each of them is substantially greater than that of ATC. In ATC's larger models now being produced and those to be introduced in fiscal 1957 as set forth under the heading "ATC's Products", competition will be experienced principally from the aforementioned three largest crawler tractor manufacturers, the major portion of whose sales are concentrated in heavy construction and road-building machinery. The sales and assets of these three crawler tractor manufacturers are substantially larger than those of ATC.

Employee Relations

ATC employs over 500 people at its Churubusco plant. It is presently conducting contract negotiations with the UAW-AFL-CIO union, recently designated as representative of the hourly rated production and maintenance employees. ATC, since it began manufacturing operations in 1950, has had no work stoppage in excess of one day's duration.

Manufacturing Facilities

ATC presently operates in one plant which, on the completion of the most recent addition in October 1956, will have a floor area of 250,000 square feet. This plant is located in Churubusco, Indiana, near Fort Wayne, on an 80-acre tract of land which also serves as a proving ground for ATC's tractors, attachments and earth-moving equipment. ATC's plant facilities, since it began operations in 1950 in a building having a floor area of 6,900 square feet, expanded during the period from 1951 to 1954 to 70,000 square feet and in February 1956 to 145,000 square feet and finally in October of this year will reach 250,000 square feet. Despite this steady expansion of its facilities, ATC has been forced to operate under crowded and adverse conditions, including the storage of substantial inventory in open areas.

Manufacturing facilities include heavy and light fabrication and welding, machine shop facilities and a newly equipped transmission manufacturing operation. ATC's property also houses its service departments, storage, shipping and receiving docks, experimental shops, as well as assembly line and painting facilities. Most of ATC's 250,000 square feet of plant is less than three-years old, of modern single-story steel and masonry construction.

Directors and Management of the Surviving Corporation

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Directors and Management of the Surviving Corporation

Directors of Surviving Corporation

Under the plan of merger Case will initially have a board of fifteen directors following the merger, including twelve members of the present Case board and three members of the present

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ATC board. Each of the fifteen directors, whose names are set forth in the Articles of Merger and Certificate of Consolidation, is to serve from the effective date of the merger until the next annual Case stockholders' meeting and until the election and qualification of his successor. The following information is given as to the proposed directors:

Name of Director, Principal Occupation or Employment	Year First Became a Director of Case or ATC	Capital Stock of Case Owned Beneficially October 1, 1956		Capital Stock of ATC Owned Beneficially October 1, 1956	
		Common	Preferred	Common	Preferred
A. O. Choate Limited Partner, Clark, Dodge & Co. Investment Securities New York City	1914	4,276			
William Ewing Limited Partner, Morgan Stanley & Co. Investment Bankers New York City	1920	1,936 and undivided 1/3 interest in additional 1,000			
L. R. Clausen Director and Consultant of Case	1924	12,900	525		
H. S. Sturgis Financial Consultant	1927	1,000			
C. M. Robertson General Counsel of Case Lawyer, member of the firm of Robertson and Hoebreckx Milwaukee, Wisconsin	1936	2,000	250		
Frederick Nymeyer Frederick Nymeyer & Company Business Counsellor South Holland, Illinois	1942	2,020			
John T. Brown Chairman of the Board of Directors and President of Case	1947	2,420			
H. G. Barr Vice-President of Case	1952	2,000	10		
Wm. J. Grede Chairman of the Executive Committee of Case President, Grede Foundries, Inc. Manufacturer of Castings Milwaukee, Wisconsin	1953	600*			
E. P. Hamilton President, Hamilton Manufacturing Co. Manufacturer of Professional Furniture and Appliances Two Rivers, Wisconsin	1953	16			
Wm. B. Peters	1955	045			

Investment Securities
New York City

William Ewing	1920	1,936	
Limited Partner, Morgan Stanley & Co. Investment Bankers New York City		and undivided 1/3 interest in additional 1,000	
L. R. Clausen	1924	12,900	525
Director and Consultant of Case			
H. S. Sturgis	1927	1,000	
Financial Consultant			
C. M. Robertson	1936	2,000	250
General Counsel of Case Lawyer, member of the firm of Robertson and Hoebreckx Milwaukee, Wisconsin			
Frederick Nymeyer	1942	2,020	
Frederick Nymeyer & Company Business Counsellor South Holland, Illinois			
John T. Brown	1947	2,420	
Chairman of the Board of Directors and President of Case			
H. G. Barr	1952	2,000	10
Vice-President of Case			
Wm. J. Grede	1953	600*	
Chairman of the Executive Committee of Case President, Grede Foundries, Inc. Manufacturer of Castings Milwaukee, Wisconsin			
E. P. Hamilton	1953	16	
President, Hamilton Manufacturing Co. Manufacturer of Professional Furniture and Appliances Two Rivers, Wisconsin			
Wm. B. Peters	1955	942	
Treasurer—Comptroller of Case			
Allan B. Kline	1955	100	
Farmer, Western Springs, Illinois			

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Name of Director, Principal Occupation or Employment	Year First Became a Director of Case or ATC	Capital Stock of Case Owned Beneficially October 1, 1956		Capital Stock of ATC Owned Beneficially October 1, 1956	
		Common	Preferred	Common	Preferred
Marc B. Rojzman President of ATC	1948			419,800	
Edward L. Elliott Senior member, Elliott & Company Brokerage Firm New York City	1954			10,200	**
Mentor Kraus Lawyer, member of the firm of Barrett, Barrett & McNagny Fort Wayne, Indiana	1952			10,000	

* Grede Foundries, Inc., of which Mr. Grede owns a controlling interest, owns an additional 500 shares of Common Stock and 100 shares of Preferred Stock of Case.

** Mrs. Ellen B. Elliott, wife of Mr. Edward L. Elliott, owns 5,000 shares of ATC Convertible Preferred Stock, Series 55-1.

All of the proposed directors, except Messrs. Elliott, Kraus and Rojzman, are now serving as members of the Case Board of Directors, having been elected to their present terms of office at the annual meeting of Case stockholders in April 1956. Mr. Elliott has been the senior member of the brokerage firm of Elliott & Company of New York City since its formation in February 1954, and for more than three years prior to that time had been a general partner of the brokerage firm of Van Alstyne, Noel & Co. of New York City. During the past five years Mr. Kraus has been a member of the firm of Barrett, Barrett & McNagny of Fort Wayne, Indiana, counsel for ATC. Mr. Rojzman has been President of ATC since its founding in 1948.

Mrs. Lillian Rojzman, Mr. Marc B. Rojzman's wife and a director and Secretary of ATC, owns beneficially 41,400 shares of ATC Common Stock. Mr. and Mrs. Rojzman own beneficially an aggregate of 461,200 shares of ATC Common Stock or approximately 42% of the total shares of ATC Common Stock outstanding as of October 1, 1956 and will be entitled to receive on the merger becoming effective an aggregate of 230,600 shares of Common Stock and 461,200 shares of 6½% Second Cumulative Preferred Stock of Case, or about 8% and 42%, respectively, of the number of shares of such classes of stock to be outstanding following the merger, based on the capitalization of ATC and Case as of July 31, 1956. (See the caption "Capitalization of ATC, Case and the Surviving Company.")

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Officers of Surviving Corporation

The officers of Case at the effective date of the merger will remain like officers of the surviving corporation. In addition it is proposed that Mr. Marc B. Rojzman, President of ATC, will become Executive Vice President and General Manager of Case, with the responsibility for and authority over the general management of the business affairs of Case. It is also proposed that Mr. Rojzman will be elected to the Executive Committee of the Case Board of Directors. It is expected that other officers of ATC will occupy appropriate positions in the management of the surviving corporation.

In connection with the merger, Mr. Rojzman will give Case an undertaking that he will not engage in any activities competitive with Case for a five year period from the effective date of the merger. While no determination has been made as to Mr. Rojzman's future salary with Case in the event the merger is consummated, it is not anticipated that such salary will initially exceed \$50,000 per annum.

Senior member, Elliott & Company
Brokerage Firm
New York City

Mentor Kraus

1952

10,000

Lawyer, member of the firm of
Barrett, Barrett & McNagny
Fort Wayne, Indiana

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Remuneration of Directors and Officers

The following table shows the aggregate remuneration paid by Case for services while acting as officers or directors of Case during the fiscal year ended October 31, 1955 to (i) each of

the three highest paid officers of Case, (ii) each director of Case during such fiscal year whose direct aggregate remuneration exceeded \$30,000, and (iii) all directors and officers of Case as a group:

<u>Name of Individual or Group</u>	<u>Capacity in which Remuneration was Received from Case</u>	<u>Fees and Salaries</u>	<u>Bonuses</u>	<u>Pension, Retirement and Similar Payments</u>	<u>Approximate Net Remuneration After Federal and State Income Taxes</u> (4)
L. R. Clausen(1)	Chairman of Board and Director	\$ 35,000	None	None	\$23,036
John T. Brown	Chairman of Board President and Director	68,000	None	None	35,375
H. G. Barr	Vice-President and Director	45,000	None	None	26,927
A. R. Hauschel(2)	Vice-President and Director	30,000	None	None	16,762
C. G. Pearse(3)	Vice-President and Director	45,000	None	None	26,621
Wm. B. Peters	Secretary-Treasurer and Director	39,600	None	None	24,395
All Officers and Directors as a Group	Officers and Directors	304,334*	None	None	

* Represents a decrease of \$68,391 from the previous year.

- (1) Effective April 28, 1955, Mr. Clausen retired as Chairman of the Board of Case and on November 1, 1955, became special consultant to the President. Mr. Clausen is entitled to and is receiving, effective November 1, 1955, an annual pension of \$20,150 under Case's Pension System, based on 31 years of service, and is being paid for special consulting services at the rate of \$15,000 per annum.
- (2) Effective November 1, 1955, Mr. Hauschel resigned as Vice-President and Director of Case and retired.
- (3) Mr. Pearse retired effective May 1, 1956.
- (4) Computed with the benefit of the split income provision of the Federal tax law except for Mr. Hauschel to whom the provision is not applicable.

For the fiscal year 1955 Case accrued \$69,320 for payment to the law firm of Robertson and Hoebreckx (in which firm Mr. C. M. Robertson is a partner) for legal services, including the services of Mr. Robertson as General Counsel of Case. Mr. Robertson has been reappointed General Counsel of Case for a three year term commencing January 1, 1956, with compensation to be approved by the President subject to a minimum retainer of \$25,000 per annum.

During the fiscal year ended August 31, 1956, ATC paid \$135,600 aggregate remuneration to all its directors and officers as a group. No officer or director received from ATC over \$30,000 during such fiscal year. Mr. David Milligan, Vice President in Charge of Sales, received as compensation in such period \$17,500 and 6,000 shares of Common Stock of ATC. ATC has no pension or retirement plan.

Case Pension System

Since 1915 Case has had in effect a Pension System under which employees have been awarded pensions upon retirement. The Pension System was established voluntarily by Case and is non-contributory. Employees of ATC joining Case as a result of the consummation of merger will become eligible for benefits under the Pension System in accordance with its terms.

The Pension System provides, among other things, that it shall apply to all officers and

<u>Name of Individual or Group</u>	<u>Remuneration was Received from Case</u>	<u>Fees and Salaries</u>	<u>Bonuses</u>	<u>Pension, Retirement and Similar Payments</u>	<u>Remuneration After Federal and State Income Taxes</u> (4)
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The Pension System provides, among other things, that it shall apply to all officers and employees of Case, or any subsidiary company, who have been and are required to give their entire time to the business of Case and to other officers and employees as to whom the Board of Directors shall make specific provision; that every officer or employee, subject to the provisions of the System, who shall have attained the age of 65 years, may, at his own request, or in the discretion of Case, be retired; that every officer or employee retired under the System on account of age,

and who shall have been continuously in the service of Case for at least twenty years, shall thereby become eligible for the benefits of the Pension System; and that annual pension allowance shall be computed upon the following basis: for each year of active, continuous service rendered, an allowance of one percent of the highest amount of annual salary or wages paid to the beneficiary in any calendar year, within the ten years next preceding his retirement, except that in the case of any officer retired on account of age, no allowance shall be accumulated beyond age sixty-five and the pension of such officer shall be fixed on the basis of his retirement at that age. This limitation shall not apply to officers who at age sixty-five have not accumulated twenty years of continuous service. Such officers, by specific action of the Board of Directors, may be permitted after age 65 to accumulate additional service up to twenty years and have their pension computed accordingly. The pension allowance of present officers serving beyond age sixty-five, who have accumulated twenty years of continuous service, shall be computed only on service up to August 26, 1955.

The following table sets forth the computation of annual pension allowances under the terms of the Pension System:

Annual Salary Used as Basis for Computing Pension	ANNUAL PENSION ALLOWANCES		
	20 Years of Active, Continuous Service	30 Years of Active, Continuous Service	40 Years of Active, Continuous Service
\$ 3,000	\$ 600	\$ 900	\$ 1,200
5,000	1,000	1,500	2,000
10,000	2,000	3,000	4,000
20,000	4,000	6,000	8,000
40,000	8,000	12,000	16,000
70,000	14,000	21,000	28,000

The Pension System also provides for pension allowances, similarly calculated, for officers and employees who, regardless of age, become permanently incapacitated or unfitted for duty after having been continuously in the service of Case for at least twenty years.

No sums are set apart or accrued by Case to provide for payment of pensions under the Pension System and no officer or employee has any contract right to receive any pension upon retirement. The Pension System provides that it "is established voluntarily by Case and may be amended, suspended or annulled at any time by the Board of Directors."

Stock Options

A proposal has been submitted to Case stockholders that the Stock Option Plan of Case be revised to increase from 100,000 to 250,000 the aggregate number of shares with respect to which options to purchase Common Stock may be granted and to increase from 10,000 to 25,000 the maximum number of shares with respect to which options may be granted to any one person. See the caption herein "Proposed Revision of the Case Stock Option Plan." Case proposes, upon obtaining necessary stockholder approval of the above revision to the Stock Option Plan and upon the merger becoming effective, to grant to each of Messrs. William Grede and Marc B. Rojzman an option to purchase 25,000 shares of Common Stock of Case and to Mr. John T. Brown an option to purchase 19,000 additional shares of Common Stock of Case. These options are in each case to be granted pursuant to the terms of the Stock Option Plan, are to be at the fair market value of the stock, and are to terminate in ten years after the date of the grant thereof or earlier as provided in the Plan.

continuous service. Such officers, by specific action of the Board of Directors, may be permitted after age 65 to accumulate additional service up to twenty years and have their pension computed accordingly. The pension allowance of present officers serving beyond age sixty-five, who have accumulated twenty years of continuous service, shall be computed only on service up to August 26, 1955.

The following table sets forth the computation of annual pension allowances under the terms of the Pension System:

Annual Salary Used as Basis for Computing Pension	ANNUAL PENSION ALLOWANCES		
	20 Years of Active, Continuous Service	30 Years of Active, Continuous Service	40 Years of Active, Continuous Service
\$ 3,000	\$ 600	\$ 900	\$ 1,200
5,000	1,000	1,500	2,000
10,000	2,000	3,000	4,000
20,000	4,000	6,000	8,000
40,000	8,000	12,000	16,000
70,000	14,000	21,000	28,000

The Pension System also provides for pension allowances, similarly calculated, for officers and employees who, regardless of age, become permanently incapacitated or unfitted for duty after having been continuously in the service of Case for at least twenty years.

No sums are set apart or accrued by Case to provide for payment of pensions under the Pension System and no officer or employee has any contract right to receive any pension upon retirement. The Pension System provides that it "is established voluntarily by Case and may be amended, suspended or annulled at any time by the Board of Directors."

Stock Options

A proposal has been submitted to Case stockholders that the Stock Option Plan of Case be revised to increase from 100,000 to 250,000 the aggregate number of shares with respect to which options to purchase Common Stock may be granted and to increase from 10,000 to 25,000 the maximum number of shares with respect to which options may be granted to any one person. See the caption herein "Proposed Revision of the Case Stock Option Plan." Case proposes, upon obtaining necessary stockholder approval of the above revision to the Stock Option Plan and upon the merger becoming effective, to grant to each of Messrs. William Grede and Marc B. Rojzman an option to purchase 25,000 shares of Common Stock of Case and to Mr. John T. Brown an option to purchase 19,000 additional shares of Common Stock of Case. These options are in each case to be granted pursuant to the terms of the Stock Option Plan, are to be at the fair market value of the stock, and are to terminate in ten years after the date of the grant thereof or earlier as provided in the Plan.

No options to purchase Common Stock of Case were granted to or exercised by any directors or officers of Case since the beginning of the fiscal year ending October 31, 1956. On September 15, 1955 ATC granted to Mr. T. A. Haller, Vice President, Engineering, an option to purchase 2,000 shares of ATC Common Stock at the rate of 400 shares a year, or cumulative at the end of a five year period, at the closing market price on the date of the granting of the option, namely

\$13. Any unexercised portion of this option is cancelled on termination of employment and will terminate upon the effectiveness of the merger.

Description of Securities of the Surviving Company

The following is a brief description of the terms of the 7% Cumulative Preferred Stock, the 6½% Second Cumulative Preferred Stock, and the Common Stock of Case, the surviving corporation, which will be effective upon the consummation of the merger. A complete statement of such terms is set forth in Articles 3 and 7 of Exhibit A hereto. The following information is also subject to the restrictions set forth under the heading "Certain Further Restrictions".

7% Cumulative Preferred Stock

Dividend Rights

The 7% Cumulative Preferred Stock is entitled to receive, when and as declared by the Board of Directors, before any dividends may be paid on the 6½% Second Cumulative Preferred Stock or on the Common Stock, cumulative dividends at the rate of 7% of the par value thereof per annum, payable quarterly.

Voting Rights

Each holder of record of 7% Cumulative Preferred Stock is entitled to eight votes per share. In addition, the Articles of Merger and Certificate of Consolidation provide that any change in the Articles of Association or By-laws of Case which would materially adversely affect the preferences, privileges, or voting powers of the 7% Cumulative Preferred Stock must be approved by the vote of the holders of at least two-thirds of such shares, voting as a class.

Liquidation Rights

In the event of any liquidation, dissolution or winding up of Case (voluntary or otherwise) the holders of the 7% Cumulative Preferred Stock shall be entitled to receive \$100 per share, plus accrued dividends.

Preemptive Rights

Case has been advised by counsel that the holders of 7% Cumulative Preferred Stock have preemptive rights with respect to any authorized unissued shares of 7% Cumulative Preferred Stock which may be issued for cash.

Miscellaneous

The 7% Cumulative Preferred Stock has no conversion rights and is non-redeemable. It contains no sinking and purchase fund provisions and is not liable to further calls or to assessment by Case.

6½% Second Cumulative Preferred Stock

Dividend Rights

Subject to the prior rights of the 7% Cumulative Preferred Stock, each share of 6½% Second Cumulative Preferred Stock is entitled to receive, when and as declared by the Board of Directors, before any dividends are paid on the Common Stock, cumulative dividends at the rate of 6½% of the par value thereof per annum, payable quarterly. Such dividends shall accrue from the date of issue, if that be a dividend date, or otherwise from a date five days after the approval of the merger by the stockholders of both Case and ATC.

Voting Rights

If at any time six quarterly dividend installments (whether or not consecutive) are

also subject to the restrictions set forth under the heading "Certain Further Restrictions".

7% Cumulative Preferred Stock

Dividend Rights

The 7% Cumulative Preferred Stock is entitled to receive, when and as declared by the Board of Directors, before any dividends may be paid on the 6½% Second Cumulative Preferred Stock or on the Common Stock, cumulative dividends at the rate of 7% of the par value thereof per annum, payable quarterly.

Voting Rights

Each holder of record of 7% Cumulative Preferred Stock is entitled to eight votes per share. In addition, the Articles of Merger and Certificate of Consolidation provide that any change in the Articles of Association or By-laws of Case which would materially adversely affect the preferences, privileges, or voting powers of the 7% Cumulative Preferred Stock must be approved by the vote of the holders of at least two-thirds of such shares, voting as a class.

Liquidation Rights

In the event of any liquidation, dissolution or winding up of Case (voluntary or otherwise) the holders of the 7% Cumulative Preferred Stock shall be entitled to receive \$100 per share, plus accrued dividends.

Preemptive Rights

Case has been advised by counsel that the holders of 7% Cumulative Preferred Stock have preemptive rights with respect to any authorized unissued shares of 7% Cumulative Preferred Stock which may be issued for cash.

Miscellaneous

The 7% Cumulative Preferred Stock has no conversion rights and is non-redeemable. It contains no sinking and purchase fund provisions and is not liable to further calls or to assessment by Case.

6½% Second Cumulative Preferred Stock

Dividend Rights

Subject to the prior rights of the 7% Cumulative Preferred Stock; each share of 6½% Second Cumulative Preferred Stock is entitled to receive, when and as declared by the Board of Directors, before any dividends are paid on the Common Stock, cumulative dividends at the rate of 6½% of the par value thereof per annum, payable quarterly. Such dividends shall accrue from the date of issue, if that be a dividend date, or otherwise from a date five days after the approval of the merger by the stockholders of both Case and ATC.

Voting Rights

If at any time six quarterly dividend installments (whether or not consecutive) have not been paid to holders of the 6½% Second Cumulative Preferred Stock as of the date set for the election of directors by the stockholders, the holders thereof shall have the right, voting as a class, to elect two members of the Case Board of Directors. In addition, any alteration in the Articles of Association or By-laws which would materially adversely affect the preferences, privileges or

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voting rights of the 6½ % Second Cumulative Preferred Stock must be approved by the votes of at least two-thirds of such shares, voting as a class. Except as provided above and as provided by law, the 6½ % Second Cumulative Preferred Stock shall have no vote.

Liquidation Rights

In the event of any voluntary liquidation, dissolution or winding up of Case the holders of the 6½ % Second Cumulative Preferred Stock shall be entitled, subject to the prior rights of the 7% Cumulative Preferred Stock, to receive \$7.35 per share, plus accrued dividends. In the event of any involuntary liquidation, dissolution or winding up of Case such shares shall be entitled to receive \$7 per share, plus accrued dividends.

Redemption Provisions

The 6½ % Second Cumulative Preferred Stock is redeemable, as a whole or in part, at any time at the option of Case at \$7.35 a share, plus accrued dividends, on not less than 30 days notice. No shares of 6½ % Second Cumulative Preferred Stock may be redeemed if there are any unpaid accrued dividends on the 7% Cumulative Preferred Stock. Unless all dividends upon 6½ % Second Cumulative Preferred Stock shall have been paid, Case shall not redeem less than all outstanding shares of such stock.

Preemptive Rights

Case has been advised by counsel that the holders of 6½ % Second Cumulative Preferred Stock will have preemptive rights, with respect to any authorized and unissued shares of 6½ % Second Cumulative Preferred Stock which may be issued for cash.

Miscellaneous

The 6½ % Second Cumulative Preferred Stock has no rights of conversion. It has no sinking and purchase fund provisions and is not liable to further calls or to assessment by Case.

Common Stock

Subject to the prior rights of the 7% Cumulative Preferred Stock and 6½ % Second Cumulative Preferred Stock, dividends may be paid on the Common Stock as declared by the Board of Directors, provided however that no dividends upon the Common Stock in excess of 6% per annum shall be declared or paid if thereby the assets of Case applicable to the payment of dividends, as determined by the Board of Directors, shall be reduced to an amount less than \$2,000,000. Each holder of record of Common Stock is entitled to one vote per share.

In case of liquidation, dissolution, or winding up (whether voluntary or involuntary), the holders of the Common Stock are entitled to the net assets of Case after the holders of the 7% Cumulative Preferred Stock and the 6½ % Second Cumulative Preferred Stock have been paid the full amounts to which they are entitled.

Case has been advised by counsel that the holders of Common Stock have preemptive rights with respect to any of the authorized and unissued shares of Common Stock which may be issued for cash except that 250,000 shares will be reserved for issuance, free of preemptive or subscription rights, under the Stock Option Plan under the proposed revision. See the caption "Proposed Revision of the Case Stock Option Plan" herein.

of any involuntary liquidation, dissolution or winding up of Case such shares shall be entitled to receive \$7 per share, plus accrued dividends.

Redemption Provisions

The 6½% Second Cumulative Preferred Stock is redeemable, as a whole or in part, at any time at the option of Case at \$7.35 a share, plus accrued dividends, on not less than 30 days notice. No shares of 6½% Second Cumulative Preferred Stock may be redeemed if there are any unpaid accrued dividends on the 7% Cumulative Preferred Stock. Unless all dividends upon 6½% Second Cumulative Preferred Stock shall have been paid, Case shall not redeem less than all outstanding shares of such stock.

Preemptive Rights

Case has been advised by counsel that the holders of 6½% Second Cumulative Preferred Stock will have preemptive rights, with respect to any authorized and unissued shares of 6½% Second Cumulative Preferred Stock which may be issued for cash.

Miscellaneous

The 6½% Second Cumulative Preferred Stock has no rights of conversion. It has no sinking and purchase fund provisions and is not liable to further calls or to assessment by Case.

Common Stock

Subject to the prior rights of the 7% Cumulative Preferred Stock and 6½% Second Cumulative Preferred Stock, dividends may be paid on the Common Stock as declared by the Board of Directors, provided however that no dividends upon the Common Stock in excess of 6% per annum shall be declared or paid if thereby the assets of Case applicable to the payment of dividends, as determined by the Board of Directors, shall be reduced to an amount less than \$2,000,000. Each holder of record of Common Stock is entitled to one vote per share.

In case of liquidation, dissolution, or winding up (whether voluntary or involuntary), the holders of the Common Stock are entitled to the net assets of Case after the holders of the 7% Cumulative Preferred Stock and the 6½% Second Cumulative Preferred Stock have been paid the full amounts to which they are entitled.

Case has been advised by counsel that the holders of Common Stock have preemptive rights with respect to any of the authorized and unissued shares of Common Stock which may be issued for cash except that 250,000 shares will be reserved for issuance, free of preemptive or subscription rights, under the Stock Option Plan under the proposed revision. See the caption "Proposed Revision of the Case Stock Option Plan" herein.

Certain Further Restrictions

Under the terms of a Trust Indenture between Case and The First National City Bank of New York, Trustee, dated February 1, 1953, Case may not declare any dividend on any share of its capital stock other than shares of its 7% Cumulative Preferred Stock outstanding on February 1, 1953 (except dividends payable in shares of its capital stock) or make any distributions (except distributions payable in shares of its capital stock) in respect of, or purchase, redeem, or acquire for a consideration, or permit any subsidiary to purchase or acquire for a consideration,

any shares of capital stock of any class of the corporation, if immediately after such declaration of a dividend or such distribution, purchase, redemption or acquisition the aggregate of all such dividends, distributions, purchases, redemptions and acquisitions, plus all dividends declared on such shares of 7% Cumulative Preferred Stock, subsequent to October 31, 1952, would exceed the aggregate of (i) the amount of net income of the Company from November 1, 1952 to the date of such dividend, distribution, purchase, redemption, or acquisition, plus (ii) \$10,000,000, plus (iii) any net consideration received by the Company after October 31, 1952 with respect to the issue of any of its capital stock of any class, which net consideration, in so far as it may consist of property other than cash, shall be taken at the fair value thereof as determined by the Board of Directors of the Company at the time of its receipt. Giving effect to the proposed merger, and on the basis of the pro forma balance sheet included herein \$13,849,580 of the earned surplus of Case will be unrestricted under such terms. It is the present intention of the Board of Directors of Case to pay dividends on the Common Stock only out of future earnings.

Amendments to Articles of Association of Case

The Plan of Merger provides that the Articles of Association of Case shall on the effective date of the merger be amended to read as set forth in Article 3 of the Articles of Merger and Certificate of Consolidation annexed hereto as Exhibit A. The purposes of these amendments are to broaden the business purposes of Case as permitted under the Wisconsin Business Corporation Law, to provide for a new class of 6½% Second Cumulative Preferred Stock to be issued under the terms of the merger, to waive preemptive rights with respect to 250,000 shares of Common Stock for which options may be granted under the Stock Option Plan, and to provide that the number of directors of Case shall be fixed by the By-laws.

Certain Tax Consequences of the Merger

A ruling has been received from the Commissioner of Internal Revenue to the effect that the merger will constitute a tax-free reorganization under which no gain or loss will be recognized to the holders of the Common Stock of ATC as a consequence of such merger; also that although the 6½% Second Cumulative Preferred Stock of Case will be "Section 306 stock", former ATC stockholders who receive the same by reason of the merger will not be taxed on the basis of ordinary income with respect to the proceeds of the disposition of such stock unless such disposition is in anticipation of a redemption thereof shortly after the issuance of such stock.

Abandonment of the Merger

The merger may be abandoned at any time before its effectiveness by mutual agreement of the Boards of Directors of Case and ATC. The merger may also be abandoned within five days after the stockholders' meetings of Case and ATC (i) by Case if the number of shares held by stockholders of Case or ATC or both objecting to the merger is, in the opinion of the Case Board, so substantial as to render the merger inadvisable, and (ii) by ATC if the proposed revision to the Case Stock Option Plan is not approved by the stockholders of Case.

on the basis of the pro forma balance sheet included herein \$13,849,580 of the earned surplus of Case will be unrestricted under such terms. It is the present intention of the Board of Directors of Case to pay dividends on the Common Stock only out of future earnings.

Amendments to Articles of Association of Case

The Plan of Merger provides that the Articles of Association of Case shall on the effective date of the merger be amended to read as set forth in Article 3 of the Articles of Merger and Certificate of Consolidation annexed hereto as Exhibit A. The purposes of these amendments are to broaden the business purposes of Case as permitted under the Wisconsin Business Corporation Law, to provide for a new class of 6½% Second Cumulative Preferred Stock to be issued under the terms of the merger, to waive preemptive rights with respect to 250,000 shares of Common Stock for which options may be granted under the Stock Option Plan, and to provide that the number of directors of Case shall be fixed by the By-laws.

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The merger may be abandoned at any time before its effectiveness by mutual agreement of the Boards of Directors of Case and ATC. The merger may also be abandoned within five days after the stockholders' meetings of Case and ATC (i) by Case if the number of shares held by stockholders of Case or ATC or both objecting to the merger is, in the opinion of the Case Board, so substantial as to render the merger inadvisable, and (ii) by ATC if the proposed revision to the Case Stock Option Plan is not approved by the stockholders of Case.

Rights of Dissenting Stockholders

Any holder of shares of Common Stock or 7% Cumulative Preferred Stock of Case is entitled to be paid the fair value of his shares, in accordance with the provisions of Section 180.69 of Wisconsin Statutes 1955, if he files with Case a written objection to the plan of merger at least 48 hours prior to the special meeting of stockholders called for November 15, 1956 and does not vote in favor of the merger at such meeting. Within 10 days of the effectiveness of the merger, Case shall notify each dissenting stockholder in writing that the merger has become effective. Each such dissenting stockholder desiring payment for his shares shall then make written demand on Case, within 20 days after the mailing of such notice, for payment of the fair value of his shares as of the day before the stockholders' vote approving the merger. Such demand shall state the

number and class of shares owned by the dissenting stockholder. If within 30 days of the effectiveness of the merger Case and a dissenting stockholder do not agree as to the fair value of his shares, the dissenting stockholder may, within 60 days after the expiration of the above 30 day period, file a petition in the circuit court for Racine County, Wisconsin, asking for a finding and determination of the fair value of such shares and shall be entitled to judgment against Case for the amount of such fair value, together with interest thereon at the rate of 5% per annum to the date of such judgment. Costs shall be taxed as the court may deem equitable.

The holders of Common Stock of ATC are also entitled, on due written objection to the merger, to demand payment for their stock and to have such stock appraised and paid for by Case in accordance with the laws of the State of New York.

II. Proposed Revision of the Case Stock Option Plan

At the annual meeting of the stockholders in 1952 a Stock Option Plan was adopted authorizing the Board of Directors to grant up to July 1, 1962 restricted stock options to employees (including officers) of Case to purchase Case Common Stock. The Case Board of Directors recommends that if the merger of ATC into Case becomes effective the Plan should be revised (i) to increase the maximum aggregate number of shares with respect to which options can be granted to 250,000 and (ii) to increase the number of shares with respect to which options can be granted to any one employee to 25,000. The favorable vote of a majority of the capital stock of Case is required for the approval of such a revision.

The Plan presently provides that the aggregate number of shares for which options may be granted under the Plan shall not exceed 100,000 shares of new Common Stock and that the aggregate number of shares for which options may be granted to any one employee under the Plan shall not exceed 10,000 shares of new Common Stock. The Plan provides that the purchase price of the Common Stock under an option shall not be less than the fair market value of the Common Stock at the time the option is granted, that each option granted under the Plan shall terminate not later than ten years after the granting of the option, that an option shall become exercisable only after eighteen months of continued employment immediately following the granting of the option and that, except in case of death or retirement with the consent of Case, an option may be exercised only during the continuance of the optionee's employment.

During the period of more than four years since the adoption of the Plan, the Case Board of Directors has granted options totalling 42,500 shares, but options covering 16,100 shares have lapsed or terminated, leaving 26,400 shares subject to options. In allotting the options totalling 42,500 shares, indicated above, the Board of Directors granted options covering 25,500 shares to eight eligible officers and directors with the balance being granted to other employees. Set forth below is information as to the amount of options already granted to (i) each director or officer of Case named in the foregoing remuneration table and (ii) each person named to be a director of Case immediately following the effective date of the merger: H. G. Barr, 3,000 shares; John T. Brown, 6,000 shares; A. R. Hauschel, 1,000 shares; C. G. Pearse, 3,500 shares; and William B. Peters, 3,000 shares.

At a recent meeting the Case Board of Directors reviewed the subject of stock options, particularly in light of the proposed merger of ATC into Case. The Board felt that it was particularly important to provide inducements for the acquisition and retention of top quality

The holders of Common Stock of ATC are also entitled, on due written objection to the merger, to demand payment for their stock and to have such stock appraised and paid for by Case in accordance with the laws of the State of New York.

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At the annual meeting of the stockholders in 1952 a Stock Option Plan was adopted authorizing the Board of Directors to grant up to July 1, 1962 restricted stock options to employees (including officers) of Case to purchase Case Common Stock. The Case Board of Directors recommends that if the merger of ATC into Case becomes effective the Plan should be revised (i) to increase the maximum aggregate number of shares with respect to which options can be granted to 250,000 and (ii) to increase the number of shares with respect to which options can be granted to any one employee to 25,000. The favorable vote of a majority of the capital stock of Case is required for the approval of such a revision.

The Plan presently provides that the aggregate number of shares for which options may be granted under the Plan shall not exceed 100,000 shares of new Common Stock and that the aggregate number of shares for which options may be granted to any one employee under the Plan shall not exceed 10,000 shares of new Common Stock. The Plan provides that the purchase price of the Common Stock under an option shall not be less than the fair market value of the Common Stock at the time the option is granted, that each option granted under the Plan shall terminate not later than ten years after the granting of the option, that an option shall become exercisable only after eighteen months of continued employment immediately following the granting of the option and that, except in case of death or retirement with the consent of Case, an option may be exercised only during the continuance of the optionee's employment.

During the period of more than four years since the adoption of the Plan, the Case Board of Directors has granted options totalling 42,500 shares, but options covering 16,100 shares have lapsed or terminated, leaving 26,400 shares subject to options. In allotting the options totalling 42,500 shares, indicated above, the Board of Directors granted options covering 25,500 shares to eight eligible officers and directors with the balance being granted to other employees. Set forth below is information as to the amount of options already granted to (i) each director or officer of Case named in the foregoing remuneration table and (ii) each person named to be a director of Case immediately following the effective date of the merger: H. G. Barr, 3,000 shares; John T. Brown, 6,000 shares; A. R. Hauschel, 1,000 shares; C. G. Pearse, 3,500 shares; and William B. Peters, 3,000 shares.

At a recent meeting the Case Board of Directors reviewed the subject of stock options, particularly in light of the proposed merger of ATC into Case. The Board felt that it was particularly important to provide inducements for the acquisition and retention of top-quality technical and executive personnel, and to give these employees even greater incentives in promoting the progress of Case. Accordingly, your Board of Directors recommends that the stockholders vote in favor of increasing the aggregate number of shares for which options may be granted under the Plan to 250,000 and increasing the maximum number of shares for which options may be granted to any one employee to 25,000. This recommendation is made with full recognition that under the Internal Revenue Code no deduction is allowable at any time

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to Case with respect to shares purchased by optionees under the Plan. However, it was also recognized that no income results to the optionee at the time of the granting of his option or at the time of the purchase of shares upon exercise of his option. Furthermore, on the sale of shares acquired through the exercise of such options the optionee is taxed on income from such sale at capital gains rates if such sale is made at least six months after the exercise of the option and at least two years after the date of its grant.

Case has agreed, in connection with the proposed merger with ATC, that upon such merger becoming effective and upon this revision to the Stock Option Plan being approved, it will forthwith grant to each of Messrs. Wm. J. Grede, a director and Chairman of the Executive Committee of Case, and Marc B. Rojzman, the President of ATC, an option to purchase 25,000 shares of Common Stock of Case and to Mr. John T. Brown, Chairman of the Board and President of Case, an option to purchase 19,000 additional shares of Common Stock of Case. These options are in each case to be granted pursuant to the terms of the Stock Option Plan, are to be at the fair market value of the stock, and are to terminate in ten years after the date of the grant thereof or earlier as provided in the Plan. It is also proposed that options will be granted to approximately seven key employees of ATC who presently hold options to purchase Common Stock of ATC. These options will be granted in accordance with the terms of the Case Stock Option Plan. While no definite commitments have been made to these employees, it is presently anticipated that options will be granted to them to purchase an aggregate of not to exceed 20,000 shares of Case Common Stock under the Plan in view of their agreements to waive their existing rights to purchase ATC Common Stock. It is impossible to indicate the names of any other officers or employees of the surviving company who will receive options or the number of shares to be covered by such options, for no determination or allotment has been made. The closing quotation of the Common Stock of Case on the New York Stock Exchange on October 15, 1956 was 13 $\frac{3}{4}$ per share.

In the event that the merger of ATC into Case is not approved by the stockholders of both companies or is abandoned for any reason, the proposed revision to the Stock Option Plan will be abandoned.

Miscellaneous

Shares for which a proxy in the accompanying form is properly signed and returned will be voted in accordance with any choice specified therein, and where no choice is specified will be voted: (i) for authorizing the plan of merger, unless it shall have been abandoned before the meeting; (ii) for the revision of the Case Stock Option Plan; and (iii) in accordance with the discretion of the person or persons voting them with respect to such other matters, if any, as may come before the meetings. The management is not aware that any such other matters are to be presented.

Attention is called to the financial statements herein. Additional financial statements relating to prior years for Case are on file at the office of the Securities and Exchange Commission, Washington, D. C., and at the office of the New York Stock Exchange.

Officers, directors and regular employees of Case and representatives of Georgeson & Co., New York, N. Y., will solicit proxies from Case's stockholders by telephone, telegraph and personal interview as well as by mail. Payments in the form of compensation and reimbursement of expenses are not expected to exceed \$12,500. The cost of solicitation of such proxies will be borne by Case.

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shares acquired through the exercise of such options the optionee is taxed on income from such sale at capital gains rates if such sale is made at least six months after the exercise of the option and at least two years after the date of its grant.

Case has agreed, in connection with the proposed merger with ATC, that upon such merger becoming effective and upon this revision to the Stock Option Plan being approved, it will forthwith grant to each of Messrs. Wm. J. Grede, a director and Chairman of the Executive Committee of Case, and Marc B. Rojzman, the President of ATC, an option to purchase 25,000 shares of Common Stock of Case and to Mr. John T. Brown, Chairman of the Board and President of Case, an option to purchase 19,000 additional shares of Common Stock of Case. These options are in each case to be granted pursuant to the terms of the Stock Option Plan, are to be at the fair market value of the stock, and are to terminate in ten years after the date of the grant thereof or earlier as provided in the Plan. It is also proposed that options will be granted to approximately seven key employees of ATC who presently hold options to purchase Common Stock of ATC. These options will be granted in accordance with the terms of the Case Stock Option Plan. While no definite commitments have been made to these employees, it is presently anticipated that options will be granted to them to purchase an aggregate of not to exceed 20,000 shares of Case Common Stock under the Plan in view of their agreements to waive their existing rights to purchase ATC Common Stock. It is impossible to indicate the names of any other officers or employees of the surviving company who will receive options or the number of shares to be covered by such options, for no determination or allotment has been made. The closing quotation of the Common Stock of Case on the New York Stock Exchange on October 15, 1956 was 13 3/4 per share.

In the event that the merger of ATC into Case is not approved by the stockholders of both companies or is abandoned for any reason, the proposed revision to the Stock Option Plan will be abandoned.

Miscellaneous

Shares for which a proxy in the accompanying form is properly signed and returned will be voted in accordance with any choice specified therein, and where no choice is specified will be voted: (i) for authorizing the plan of merger, unless it shall have been abandoned before the meeting; (ii) for the revision of the Case Stock Option Plan; and (iii) in accordance with the discretion of the person or persons voting them with respect to such other matters, if any, as may come before the meeting. The management is not aware that any such other matters are to be presented.

Attention is called to the financial statements herein. Additional financial statements relating to prior years for Case are on file at the office of the Securities and Exchange Commission, Washington, D. C., and at the office of the New York Stock Exchange.

Officers, directors and regular employees of Case and representatives of Georgeson & Co., New York, N. Y., will solicit proxies from Case's stockholders by telephone, telegraph and personal interview as well as by mail. Payments in the form of compensation and reimbursement of expenses are not expected to exceed \$12,500. The cost of solicitation of such proxies will be borne by Case.

It is important that proxies be returned promptly. Therefore, stockholders who do not expect to attend in person are urged to fill in, sign and return the enclosed proxy.

BY ORDER OF THE BOARD OF DIRECTORS

L. T. NEWMAN,
Secretary.

Dated: October 15, 1956.

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OPINION OF INDEPENDENT PUBLIC ACCOUNTANTS

To the Board of Directors of
J. I. CASE COMPANY

In our opinion, the financial statements of J. I. Case Company, listed in the attached index, present fairly the financial position of J. I. Case Company at October 31, 1955 and the results of its operations for the three years then ended, and the "Summary of Sales and Earnings" fairly summarizes the data shown therein for the ten years ended October 31, 1955, in conformity with generally accepted accounting principles applied on a consistent basis throughout the periods, except for the change, which we approve, in the method of inventory valuation in the fiscal year 1951, as explained in note 5 to the "Summary of Sales and Earnings." This opinion is based on examinations of the statements and summary which were made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

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OPINION OF INDEPENDENT PUBLIC ACCOUNTANTS

To the Board of Directors of
J. I. CASE COMPANY

In our opinion, the financial statements of J. I. Case Company, listed in the attached index, present fairly the financial position of J. I. Case Company at October 31, 1955 and the results of its operations for the three years then ended, and the "Summary of Sales and Earnings" fairly summarizes the data shown therein for the ten years ended October 31, 1955, in conformity with generally accepted accounting principles applied on a consistent basis throughout the periods, except for the change, which we approve, in the method of inventory valuation in the fiscal year 1951, as explained in note 5 to the "Summary of Sales and Earnings." This opinion is based on examinations of the statements and summary which were made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

PRICE WATERHOUSE & Co.

CHICAGO
December 28, 1955

J. I. CASE COMPANY

BALANCE SHEET

October 31, 1955 and July 31, 1956

(See notes to financial statements)

ASSETS

	October 31, 1955		July 31, 1956 (Unaudited)	
CURRENT ASSETS:				
Cash	\$	3,692,445	\$	4,659,794
Notes and accounts receivable:				
Customers—				
Notes	\$	7,043,325	\$	8,177,059
Accounts		46,364,981		60,802,874
Sundry debtors		469,418		1,326,464
		<u>\$53,877,724</u>		<u>\$70,306,397</u>
Estimated doubtful accounts (Note 2)	700,000	53,177,724	887,831	69,418,566
Inventories (valued at cost, principally on "last-in, first-out" basis) (Note 3):				
Raw materials and supplies	\$	7,319,772		
Work in process		8,203,919		
Finished goods (including freight and duty)		<u>26,664,847</u>		<u>39,723,815</u>
Total current assets		<u>\$ 99,058,707</u>		<u>\$113,802,175</u>
OTHER ASSETS:				
Marketable foreign securities, at the lower of cost or approximate quoted market value, plus accrued interest	\$	598,845	\$	62,000
Miscellaneous		<u>193,516</u>		<u>202,354</u>
		792,361		264,354
PROPERTIES (based on 1907 or 1911 appraisals, plus subsequent additions at cost):				
Land	\$	2,350,790	\$	2,364,417
Buildings and building equipment	\$21,792,908		\$21,702,855	
Machinery and equipment	38,780,754		38,807,740	
Patterns	1,530,823		1,594,533	
Furniture and fixtures	1,618,942		1,710,669	
Autos, auto trucks and planes	217,102		216,275	
	<u>\$63,940,529</u>		<u>\$64,032,072</u>	
Accumulated depreciation (Note 4)	32,785,039		35,299,273	

ASSETS

October 31, 1955

July 31, 1956
(Unaudited)

CURRENT ASSETS:

Cash	\$ 3,692,445		\$ 4,659,794
Notes and accounts receivable:			
Customers—			
Notes	\$ 7,043,325		\$ 8,177,059
Accounts	46,364,981		60,802,874
Sundry debtors	469,418		1,326,464
	<u>\$53,877,724</u>		<u>\$70,306,397</u>
Estimated doubtful accounts (Note 2)	700,000	53,177,724	887,831
			<u>69,418,566</u>
Inventories (valued at cost, principally on "last-in, first-out" basis) (Note 3):			
Raw materials and supplies	\$ 7,319,772		
Work in process	8,203,919		
Finished goods (including freight and duty)	26,664,847	42,188,538	39,723,815
Total current assets		<u>\$ 99,058,707</u>	<u>\$113,802,175</u>

OTHER ASSETS:

Marketable foreign securities, at the lower of cost or approximate quoted market value, plus accrued interest	\$ 598,845		\$ 62,000
Miscellaneous	193,516	792,361	202,354
			<u>264,354</u>

PROPERTIES (based on 1907 or 1911 appraisals, plus subsequent additions at cost):

Land	\$ 2,350,790		\$ 2,364,417
Buildings and building equipment	\$21,792,908	\$21,702,855	
Machinery and equipment	38,780,754	38,807,740	
Patterns	1,530,823	1,594,533	
Furniture and fixtures	1,618,942	1,710,669	
Autos, auto trucks and planes	217,102	216,275	
	<u>\$63,940,529</u>	<u>\$64,032,072</u>	
Accumulated depreciation (Note 4)	32,785,039	35,299,273	
	<u>\$31,155,490</u>	<u>\$28,732,799</u>	
Construction in progress	—	895,008	29,627,807
	<u>31,155,490</u>	<u>33,506,280</u>	<u>31,992,224</u>
PATENTS, DESIGNS, DEVICES, ETC. (Note 5)		1	1
PREPAID INSURANCE PREMIUMS, ETC.		904,071	909,653
		<u>\$134,261,420</u>	<u>\$146,968,407</u>

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J. I. CASE COMPANY

BALANCE SHEET

October 31, 1955 and July 31, 1956

(See notes to financial statements)

LIABILITIES

	October 31, 1955	July 31, 1956 (Unaudited)
CURRENT LIABILITIES:		
Notes payable to banks.....	\$ 7,000,000	\$ 27,450,000
Accounts payable	3,491,202	2,539,465
Accrued liabilities	1,883,375	594,573
Dividends payable on preferred stock.....	162,586	162,586
Federal and other taxes on income.....	2,017,006	705,678
Total current liabilities.....	\$ 14,554,169	\$ 31,452,302
TWENTY-FIVE YEAR 3½% SINKING FUND DEBENTURES, due February 1, 1978:		
(Sinking fund payments of \$630,000 per year are required starting in 1958).....	25,000,000	25,000,000
CAPITAL STOCK (Note 6):		
7% cumulative preferred stock:		
Authorized—101,825 shares \$100 par value each		
Issued—92,906 shares	\$ 9,290,600	\$ 9,290,600
Common stock:		
Authorized—4,000,000 shares of \$12.50 par value each		
Issued—2,262,766 shares	28,284,575	28,284,575
	37,575,175	37,575,175
CAPITAL CONTRIBUTED BY STOCKHOLDERS IN EXCESS OF PAR VALUE OF SECURITIES*	10,008,314	10,008,314
ACCUMULATED EARNINGS RETAINED (Note 7):		
For possible future inventory losses*.....	\$ 7,000,000	\$ 7,000,000
For general contingencies*.....	5,975,000	5,975,000
For reinvestment in the business (per accompanying statement)	34,148,762	29,957,616
	47,123,762	42,932,616

* No change during three year and nine month period ended July 31, 1956.

[Col. 57]

	October 31, 1955		July 31, 1956 (Unaudited)	
CURRENT LIABILITIES:				
Notes payable to banks.....	\$	7,000,000		\$ 27,450,000
Accounts payable		3,491,202		2,539,465
Accrued liabilities		1,883,375		594,573
Dividends payable on preferred stock.....		162,586		162,586
Federal and other taxes on income.....		2,017,006		705,678
Total current liabilities.....	\$	14,554,169		\$ 31,452,302
TWENTY-FIVE YEAR 3½% SINKING FUND DEBENTURES, due February 1, 1978:				
(Sinking fund payments of \$630,000 per year are required starting in 1958).....		25,000,000		25,000,000
CAPITAL STOCK (Note 6):				
7% cumulative preferred stock:				
Authorized—101,825 shares \$100 par value each				
Issued—92,906 shares.....	\$	9,290,600		\$ 9,290,600
Common stock:				
Authorized—4,000,000 shares of \$12.50 par value each				
Issued—2,262,766 shares.....	28,284,575	37,575,175	28,284,575	37,575,175
CAPITAL CONTRIBUTED BY STOCKHOLDERS IN EXCESS OF PAR VALUE OF SECURITIES*				
		10,008,314		10,008,314
ACCUMULATED EARNINGS RETAINED (Note 7):				
For possible future inventory losses*.....	\$	7,000,000		\$ 7,000,000
For general contingencies*.....		5,975,000		5,975,000
For reinvestment in the business (per accompanying statement).....	34,148,762	47,123,762	29,957,616	42,932,616

* No change during three year and nine month period ended July 31, 1956.

[fol. 57]

\$134,261,420

\$146,968,407

J. I. CASE COMPANY

STATEMENT OF INCOME AND ACCUMULATED EARNINGS RETAINED FOR REINVESTMENT IN THE BUSINESS

For the Three Years Ended October 31, 1955 and Nine Months Ended July 31, 1956

(See notes to financial statements)

	Nine months ended July 31, 1956 (unaudited)	Fiscal year ended October 31,		
		1955	1954	1953
Sales	\$64,102,899	\$94,848,841	\$92,350,901	\$111,470,611
Less—Discounts, freight, duty, etc.	4,491,367	5,955,099	5,239,275	7,007,192
Net sales	\$59,611,532	\$88,893,742	\$87,111,626	\$104,463,419
Deduct—Cost of goods sold (Note 3)	54,759,333	74,524,310	75,732,169	89,914,152
Gross profit	\$ 4,852,199	\$14,369,432	\$11,379,457	\$ 14,549,267
Selling, distribution and administrative expense (Note 2)	8,516,510	11,787,496	11,555,974	11,760,802
Income or (loss) from operations	<u>\$ (3,664,311)</u>	<u>\$ 2,581,936</u>	<u>\$ (176,517)</u>	<u>\$ 2,788,465</u>
Other income or (expense):				
Cash discount on purchases	\$ 157,963	\$ 212,475	\$ 183,300	\$ 282,582
Interest	398,795	421,189	290,943	176,147
Miscellaneous	(40,266)	(110,191)	211,692	82,939
	<u>\$ 516,492</u>	<u>\$ 523,473</u>	<u>\$ 685,935</u>	<u>\$ 541,668</u>
	<u>\$ (3,147,819)</u>	<u>\$ 3,105,409</u>	<u>\$ 509,418</u>	<u>\$ 3,330,133</u>
Interest expense:				
3½% debentures	\$ 656,250	\$ 875,000	\$ 875,000	\$ 656,250
Other interest	599,320	560,579	638,670	1,043,318
	<u>\$ 1,255,570</u>	<u>\$ 1,435,579</u>	<u>\$ 1,513,670</u>	<u>\$ 1,699,568</u>
Income or (loss) before provision for taxes on in- come	<u>\$ (4,403,389)</u>	<u>\$ 1,669,830</u>	<u>\$ (1,004,252)</u>	<u>\$ 1,630,565</u>
Provision for taxes on income or (refund):				
Federal	\$ (700,000)	\$ 500,000	\$ (500,000)	\$ 480,000
State and foreign	—	267,000	45,000	370,000
	<u>\$ (700,000)</u>	<u>\$ 767,000</u>	<u>\$ (455,000)</u>	<u>\$ 850,000</u>
Net income or (loss) for the period	<u>\$ (3,703,389)</u>	<u>\$ 902,830</u>	<u>\$ (549,252)</u>	<u>\$ 780,565</u>
Accumulated earnings retained for reinvestment in the business at beginning of period	34,148,762	34,058,860	36,389,837	40,785,114
	<u>\$30,445,373</u>	<u>\$34,961,690</u>	<u>\$35,840,585</u>	<u>\$ 41,565,679</u>
Deduct:				
Cash dividends paid or declared:				
7% cumulative preferred stock \$7.00 per share (\$3.50 per share paid to July 31, 1956)	\$ 325,171	\$ 650,342	\$ 650,342	\$ 650,342
7% cumulative preferred stock \$1.75 per share payable October 1, 1956 to holders of record September 12, 1956, and \$1.75 per share payable January 3, 1956 to holders of record December 12, 1955				

[Col. 58]

	1956 (unaudited)	Fiscal year ended		
		1955	1954	1953
Sales	\$64,102,899	\$94,848,841	\$92,350,901	\$111,470,611
Less—Discounts, freight, duty, etc.	4,491,367	5,955,099	5,239,275	7,007,192
Net sales	\$59,611,532	\$88,893,742	\$87,111,626	\$104,463,419
Deduct—Cost of goods sold (Note 3)	54,759,333	74,524,310	75,732,169	89,914,152
Gross profit	\$ 4,852,199	\$14,369,432	\$11,379,457	\$ 14,549,267
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Other income or (expense):				
Cash discount on purchases	\$ 157,963	\$ 212,475	\$ 183,300	\$ 282,582
Interest	398,795	421,189	290,943	176,147
Miscellaneous	(40,266)	(110,191)	211,692	82,939
	<u>\$ 516,492</u>	<u>\$ 523,473</u>	<u>\$ 685,935</u>	<u>\$ 541,668</u>
	<u>\$ (3,147,819)</u>	<u>\$ 3,105,409</u>	<u>\$ 509,418</u>	<u>\$ 3,330,133</u>
Interest expense:				
3½ % debentures	\$ 656,250	\$ 875,000	\$ 875,000	\$ 656,250
Other interest	599,320	560,579	638,670	1,043,318
	<u>\$ 1,255,570</u>	<u>\$ 1,435,579</u>	<u>\$ 1,513,670</u>	<u>\$ 1,699,568</u>
Income or (loss) before provision for taxes on income	<u>\$ (4,403,389)</u>	<u>\$ 1,669,830</u>	<u>\$ (1,004,252)</u>	<u>\$ 1,630,565</u>
Provision for taxes on income or (refund):				
Federal	\$ (700,000)	\$ 500,000	\$ (500,000)	\$ 480,000
State and foreign	—	267,000	45,000	370,000
	<u>\$ (700,000)</u>	<u>\$ 767,000</u>	<u>\$ (455,000)</u>	<u>\$ 850,000</u>
Net income or (loss) for the period	<u>\$ (3,703,389)</u>	<u>\$ 902,830</u>	<u>\$ (549,252)</u>	<u>\$ 780,565</u>
Accumulated earnings retained for reinvestment in the business at beginning of period	34,148,762	34,058,860	36,389,837	40,785,114
	<u>\$30,445,373</u>	<u>\$34,961,690</u>	<u>\$35,840,585</u>	<u>\$ 41,565,679</u>
Deduct:				
Cash dividends paid or declared:				
7% cumulative preferred stock \$7.00 per share (\$3.50 per share paid to July 31, 1956)	\$ 325,171	\$ 650,342	\$ 650,342	\$ 650,342
7% cumulative preferred stock \$1.75 per share payable October 1, 1956 to holders of record September 12, 1956, and \$1.75 per share payable January 3, 1956 to holders of record December 12, 1955	162,586	162,586		
Common stock \$.50 per share in 1954, and \$2.00 per share in 1953	—	—	1,131,383	4,525,500
	<u>\$ 487,757</u>	<u>\$ 812,928</u>	<u>\$ 1,781,725</u>	<u>\$ 5,175,842</u>
Accumulated earnings retained for reinvestment in the business at end of period (Note 7)	<u>\$29,957,616</u>	<u>\$34,148,762</u>	<u>\$34,058,860</u>	<u>\$ 36,389,837</u>

[fol. 58]

J. I. CASE COMPANY

NOTES TO FINANCIAL STATEMENTS

1. BASIS OF TRANSLATION OF FOREIGN CURRENCY ITEMS:

The foreign currency assets and liabilities of branch houses included in the financial statements have been translated into U. S. currency on the following bases:

- (a) Net current assets—at approximate official or other rates based upon subsequent realization or free rates as at the date of the financial statement.
- (b) Properties—at the equivalent of U. S. dollar cost at date of purchase, less accrued depreciation in U. S. dollars upon such dollar cost.

The net assets of branch houses in foreign countries, stated in U. S. dollars, are as follows:

	July 31, 1956 (unaudited)	October 31, 1955
Canada	\$14,020,741	\$11,435,966
South America	3,130,928	3,928,224
Other foreign countries	2,486,270	2,441,491
	<u>\$19,637,939</u>	<u>\$17,805,681</u>

The major portion of these net assets is represented by net current assets and includes substantial amounts of accounts receivable collectible in U. S. dollars. Accounts receivable collectible in other currencies are subject to various restrictions.

The net profit or (loss) in respect of foreign branch houses included in the statement of income for the years included is as follows:

	July 31, 1956 (unaudited)	October 31, 1955	October 31, 1954	October 31, 1953
Canadian branches	\$(120,176)	\$(374,401)	\$(375,217)	\$ 460,829
South American branches	(407,045)	130,092	(360,573)	(423,142)

The unrealized exchange loss on the translation of the foreign currency net assets into U. S. dollars has been taken into profit and loss.

2. ESTIMATED DOUBTFUL ACCOUNTS:

Selling, distribution and administrative expense for the year ended October 31, 1955 includes a charge of \$329,077 for bad debts. Of this amount \$200,000 was credited to estimated doubtful accounts, thereby increasing the balance of this account from \$500,000 at the beginning of the year to \$700,000 at the end of the year. A similar provision of \$225,000 is included in that classification for the nine-month period ended July 31, 1956 (unaudited). The latter provision may be subject to adjustment at the end of the fiscal year.

3. INVENTORIES:

Opening and closing inventories for the three fiscal years ended October 31, 1955 were determined by physical count at September 30 of the respective years adjusted for net transactions during the month of October in each year. In the absence of physical inventories since September 1955, the inventory amounts are those shown by the books. It is, of course, impossible to determine the net adjustment that would be required to the book records at July 31, 1956. However, based upon prior years' experience it is expected that no substantial adjustment will be required when physical inventories are taken as at September 30, 1956. Substantially all of the inventories, the aggregate amounts of which are shown below, are stated on the basis of "last-in first-out". As at July 31, 1956 the carrying value of inventories was approximately \$10,000,000 below the company's standard costs. The amounts of inventories used in computing cost of goods sold were as follows:

October 31—	
1952	\$70,127,994

into U. S. currency on the following bases:

- (a) Net current assets—at approximate official or other rates based upon subsequent realization or free rates as at the date of the financial statement.
- (b) Properties—at the equivalent of U. S. dollar cost at date of purchase, less accrued depreciation in U. S. dollars upon such dollar cost.

The net assets of branch houses in foreign countries, stated in U. S. dollars, are as follows:

	July 31, 1956 (unaudited)	October 31, 1955
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Other foreign countries	2,486,270	2,441,491
	<u>\$19,637,939</u>	<u>\$17,805,681</u>

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The net profit or (loss) in respect of foreign branch houses included in the statement of income for the years included is as follows:

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3. INVENTORIES:

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October 31—	
1952	\$70,127,994
1953	62,283,397
1954	49,275,080
1955	42,188,538
July 31, 1956 (estimated)	39,723,815

4. DEPRECIATION AND MAINTENANCE AND REPAIRS:

The provisions for depreciation on the properties were computed at the rates shown below applied to the gross asset balances at the beginning of the year, after eliminating fully depreciated items and assets retired during the year, and one-half of such rates applied to net additions during the year:

<u>Description</u>	<u>Rate</u>
Buildings and building equipment.....	2% to 10%
Machinery and equipment.....	8% to 25%
Patterns	8%
Office furniture and fixtures.....	8% and 10%
Automobiles (credited direct to asset account).....	30%

In accordance with the policy of the company all expenditures for maintenance and repairs are charged to profit and loss and all additions and betterments are capitalized. Properties retired or otherwise disposed of are eliminated from the property accounts; the accumulated reserves for depreciation in respect thereof are eliminated from the respective reserve accounts; and profits or losses on properties retired or otherwise disposed of are credited or charged to profit and loss.

5. PATENTS, DESIGNS, DEVICES, ETC.:

The patents, designs, devices, etc., are carried on the company's books at a nominal value of \$1.00. The expenditures incurred annually in research and engineering work for the purpose of developing new machines and improving present products, including patent expenditures are charged to operations.

6. CAPITAL STOCK AND STOCK OPTIONS:

On October 2, 1952 the company granted to its officers and other management employees options to purchase in the aggregate 42,500 shares of the company's \$12.50 par value common stock at a price of \$24.25 per share, the market value on that date.

All options became exercisable on April 2, 1954, at which time the fair market value was \$15.38 per share, and must be exercised on or before October 2, 1962. As at July 31, 1956 options to purchase 16,100 shares of common stock had lapsed, and no other options had been exercised.

7. ACCUMULATED EARNINGS RETAINED:

Under the provisions of the indenture dated February 1, 1953, relating to the twenty-five year 3½% sinking fund debentures, \$43,760,114 of accumulated earnings retained at October 31, 1955 were not available for the payment of dividends (other than stock dividends) on common stock and at July 31, 1956 none of the accumulated earnings retained were available for the payment of such dividends.

8. PENSION SYSTEM:

The company's pension system is entirely voluntary and may be amended, suspended or annulled at any time by the Board of Directors. There are no vested rights. In the opinion of company's counsel, there is no liability for past services and consequently no provision has been made therefor. Pension payments to retired employees amounted to approximately \$360,000, \$467,000 and \$600,000 for the fiscal years ended October 31, 1953; 1954 and 1955, respectively, and \$551,000 in the nine months ended July 31, 1956.

See also caption "Case Pension System" in this proxy statement.

9. SUPPLEMENTARY PROFIT AND LOSS INFORMATION:

	Charged directly to income		
	To costs or operating expenses	Other	Total
Nine months ended July 31, 1956 (unaudited):—			
Maintenance and repairs.....	\$2,907,357	\$113,081	\$3,020,438
Depreciation	2,655,131	302,388	2,957,519
Taxes other than income taxes:			
Real estate and personal property taxes.....	496,484	251,584	748,068
Social security taxes	531,585	109,567	641,152
Other	19,907	58,717	78,624
Rents and royalties.....	15,171	41,948	57,119
Year ended October 31, 1955:—			
Maintenance and repairs.....	\$2,999,040	\$ 24,949	\$3,023,989
Depreciation	3,404,946	429,568	3,834,514
Taxes other than income taxes:			
Real estate and personal property taxes.....	688,200	362,509	1,050,709
Social security taxes	591,122	146,175	737,297
Other	9,932	156,942	166,874
Rents and royalties.....	12,403	49,528	61,931
Year ended October 31, 1954:—			
Maintenance and repairs.....	\$2,942,298	\$ 14,995	\$2,957,293
Depreciation	3,430,976	418,775	3,849,751
Taxes other than income taxes:			
Real estate and personal property taxes.....	611,943	357,639	969,582
Social security taxes	542,893	147,450	690,343
Other	3,219	156,411	159,630
Rents and royalties.....	19,419	60,287	79,706
Year ended October 31, 1953:—			
Maintenance and repairs.....	\$4,681,497	\$ 35,398	\$4,716,895
Depreciation	3,349,800	479,386	3,829,186
Taxes other than income taxes:			
Real estate and personal property taxes.....	652,944	304,169	957,113
Social security taxes	617,443	151,938	769,381
Other	2,703	361,761	364,464
Rents and royalties.....	64,636	62,135	126,771

[fol. 61]

ACCOUNTANTS' CERTIFICATE

We have examined the statement of financial condition of American Tractor Corporation, Churubusco, Indiana (a New York corporation), as at August 31, 1955, and the statements of profit and loss, surplus and supplementary profit and loss information for the fiscal periods ended December 31, 1952, August 31, 1953, August 31, 1954 and August 31, 1955. We have reviewed the system of internal control and the accounting procedures of the company, and, without making a detailed audit of the transactions, have examined or tested accounting records and other supporting evidence by methods and to the extent we deemed appropriate. Our examination was made in accordance with generally accepted auditing standards applicable in the circumstances, and included all procedures which we deemed necessary.

In our opinion, the accompanying statement of financial condition and the related statements of profit and loss, surplus and supplementary profit and loss information present fairly the position of American Tractor Corporation at August 31, 1955, and the results of its operations for the fiscal periods above indicated, in conformity with generally accepted accounting principles applied on a consistent basis.

We have made a similar examination for the year ended December 31, 1951 and, in our opinion, the "Summary of Sales and Earnings" fairly summarizes the information set forth therein for the five fiscal periods from January 1, 1951, to August 31, 1955, in conformity with generally accepted accounting principles applied on a consistent basis.

We have made no verification of the financial statements to the extent they refer to periods and dates subsequent to August 31, 1955 and therefore express no opinion with regard thereto.

DETMER, LIPP AND COMPANY,
Certified Public Accountants.

Fort Wayne, Indiana.
November 8, 1955

AMERICAN TRACTOR CORPORATION, CHURUBUSCO, INDIANA

STATEMENT OF FINANCIAL CONDITION

As at August 31, 1955 and July 31, 1956

(See notes to financial statements)

ASSETS

	August 31, 1955	July 31, 1956 (Unaudited)
CURRENT ASSETS:		
Cash	\$ 434,622	\$ 281,556
Accounts and Notes Receivable—Trade (Note 1)	704,549	1,032,607
Merchandise Inventories (Note 2)	1,332,085	2,401,975
Prepaid Expenses	33,083	41,321
TOTAL CURRENT ASSETS	\$2,504,339	\$3,757,459
NON-CURRENT ASSETS	\$ 7,134	\$ 8,971
PROPERTY, PLANT AND EQUIPMENT (Note 3)	\$ 778,955	\$1,418,168
DEFERRED CHARGES:		
Deferred Original Engineering and Development Expense	\$ 90,833	\$ 72,500
Deferred Pattern and Die Expense	116,598	271,036
Other Deferred Charges	12,154	148,642
TOTAL DEFERRED CHARGES	\$ 219,585	\$ 492,178
TOTAL ASSETS	\$3,510,013	\$5,676,776

LIABILITIES

CURRENT LIABILITIES:		
Notes Payable—Bank (Note 4)	\$ 385,252	\$ 190,639
Real Estate Mortgage Payable—Bank (Note 5)	62,500	99,000
Real Estate Mortgages Payable—Other	3,404	—
Chattel Mortgages Payable	57,305	34,637
Accounts Payable—Trade	958,865	1,412,659
Notes Payable—Officers	—	140,000
Federal Income Taxes Payable	69,320	331,410
Other Accruals	130,556	141,778
TOTAL CURRENT LIABILITIES	\$1,667,202	\$2,350,123
LONG-TERM OBLIGATIONS:		
Notes Payable—Vendors	\$ 69,028	\$ —
Real Estate Mortgage Payable—Bank (Note 5)	432,500	801,000
Real Estate Mortgages Payable—Other (Note 6)	251,000	—
Chattel Mortgages Payable	22,488	—
Notes Payable—Officers	100,000	—
TOTAL LONG-TERM OBLIGATIONS	\$ 875,016	\$ 801,000
COMMITMENTS AND CONTINGENT LIABILITIES (Note 7)		
TOTAL LIABILITIES	\$2,542,218	\$3,151,123

STOCKHOLDERS' EQUITY

CAPITAL STOCK:		
Preferred (Note 8)	\$ —	\$1,250,000
Common (Note 9)	274,848	276,926
SURPLUS:		
Paid In	593,466	619,076
Earned (Note 10)	99,481	379,651
TOTAL STOCKHOLDERS' EQUITY	\$ 967,795	\$2,525,653
TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY	\$3,510,013	\$5,676,776

ASSETS

	August 31, 1962	July 31, 1962 (Unaudited)
CURRENT ASSETS:		
Cash	\$ 434,622	\$ 281,556
Accounts and Notes Receivable—Trade (Note 1)	704,549	1,032,607
Merchandise Inventories (Note 2)	1,332,085	2,401,975
Prepaid Expenses	33,083	41,321
TOTAL CURRENT ASSETS	\$2,504,339	\$3,757,459
NON-CURRENT ASSETS	\$ 7,134	\$ 8,971
PROPERTY, PLANT AND EQUIPMENT (Note 3)	\$ 778,955	\$1,418,168
DEFERRED CHARGES:		
Deferred Original Engineering and Development Expense	\$ 90,833	\$ 72,500
Deferred Pattern and Die Expense	116,598	271,036
Other Deferred Charges	12,154	148,642
TOTAL DEFERRED CHARGES	\$ 219,585	\$ 492,178
TOTAL ASSETS	\$3,510,013	\$5,676,776

LIABILITIES

CURRENT LIABILITIES:		
Notes Payable—Bank (Note 4)	\$ 385,252	\$ 190,639
Real Estate Mortgage Payable—Bank (Note 5)	62,500	99,000
Real Estate Mortgages Payable—Other	3,404	—
Chattel Mortgages Payable	57,305	34,637
Accounts Payable—Trade	958,865	1,412,659
Notes Payable—Officers	—	140,000
Federal Income Taxes Payable	69,320	331,410
Other Accruals	130,556	141,778
TOTAL CURRENT LIABILITIES	\$1,667,202	\$2,350,123
LONG-TERM OBLIGATIONS:		
Notes Payable—Vendors	\$ 69,028	\$ —
Real Estate Mortgage Payable—Bank (Note 5)	432,500	801,000
Real Estate Mortgages Payable—Other (Note 6)	251,000	—
Chattel Mortgages Payable	22,488	—
Notes Payable—Officers	100,000	—
TOTAL LONG-TERM OBLIGATIONS	\$ 875,016	\$ 801,000
COMMITMENTS AND CONTINGENT LIABILITIES (Note 7)	\$2,542,218	\$3,151,123
TOTAL LIABILITIES		

STOCKHOLDERS' EQUITY

CAPITAL STOCK:		
Preferred (Note 8)	\$ —	\$1,250,000
Common (Note 9)	274,848	276,926
SURPLUS:		
Paid In	593,466	619,076
Earned (Note 10)	99,481	379,651
TOTAL STOCKHOLDERS' EQUITY	\$ 967,795	\$2,525,653
TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY	\$3,510,013	\$5,676,776

AMERICAN TRACTOR CORPORATION, CHURUBUSCO, INDIANA

ANALYSIS OF SURPLUS ACCOUNTS

For the Year Ended December 31, 1952, the Eight Months Period Ended August 31, 1953, the Years Ended August 31, 1954 and August 31, 1955, and the Eleven Months Period Ended July 31, 1956

	Year Ended December 31, 1952	Eight Months Period Ended August 31, 1953	Year Ended August 31, 1954	Year Ended August 31, 1955	Eleven Months Period Ended July 31, 1956 (Unaudited)
PAID IN SURPLUS:					
Balance at Beginning of Year.....	\$ —	\$ 69,300	\$ 85,562	\$ 500,405	\$593,466
Add:					
Excess of proceeds over par value from sale of capital stock (23,100 shares in 1952; 16,595 shares in 1953; 1,600 shares in 1954; 27,000 shares in 1955; 8,314 shares in 1956).....	69,300	19,262	3,300	93,061	25,110
Reduction in par value of common stock from \$2.00 to \$.60 per share on 239,895 shares then outstanding.....	—	—	359,843	—	—
Excess of par value of preferred stock converted to 100,000 shares of common stock.....	—	—	50,000	—	—
Stock purchase warrants sold on common stock (170,000 shares in 1954, 50,000 shares in 1956).....	—	—	1,700	—	500
	\$ 69,300	\$ 88,562	\$ 500,405	\$ 593,466	\$619,076
Less:					
Premium paid on repurchase of 1,000 shares of common stock.....	—	3,000	—	—	—
BALANCE AT CLOSE OF YEAR	\$ 69,300	\$ 85,562	\$ 500,405	\$ 593,466	\$619,076
EARNED SURPLUS:					
Balance at Beginning of Year.....	\$ 49,542	\$ 8,384	\$ (80,430)	\$ (247,301)	\$ 99,481
Add:					
Net Profit or (Loss) for the Year	(39,908)	(88,814)	(166,871)	346,782	306,211
	\$ 9,634	\$ (80,430)	\$ (247,301)	\$ 99,481	\$405,692
Deduct:					
Dividends Paid on Preferred Stock	1,250	—	—	—	26,041

	Year Ended December 31, 1953	Eight Months Period Ended August 31, 1953	Year Ended August 31, 1954	Year Ended August 31, 1955	Eleven Months Period Ended July 31, 1956 (Unaudited)
PAID IN SURPLUS:					
Balance at Beginning of Year.....	\$ —	\$ 69,300	\$ 85,562	\$ 500,405	\$593,466
Add:					
Excess of proceeds over par value - from sale of capital stock (23,100 shares in 1952; 16,595 shares in 1953; 1,600 shares in 1954; 27,000 shares in 1955; 8,314 shares in 1956).....	69,300	19,262	3,300	93,061	25,110
Reduction in par value of com- mon stock from \$2.00 to \$.50 per share on 239,895 shares then outstanding	—	—	359,843	—	—
Excess of par value of preferred stock converted to 100,000 shares of common stock.....	—	—	50,000	—	—
Stock purchase warrants sold on common stock (170,000 shares in 1954, 50,000 shares in 1956)	—	—	1,700	—	500
	<u>\$ 69,300</u>	<u>\$ 88,562</u>	<u>\$ 500,405</u>	<u>\$ 593,466</u>	<u>\$619,076</u>
Less:					
Premium paid on repurchase of 1,000 shares of common stock..	—	3,000	—	—	—
BALANCE AT CLOSE OF YEAR	<u><u>\$ 69,300</u></u>	<u><u>\$ 85,562</u></u>	<u><u>\$ 500,405</u></u>	<u><u>\$ 593,466</u></u>	<u><u>\$619,076</u></u>
EARNED SURPLUS:					
Balance at Beginning of Year.....	\$ 49,542	\$ 8,384	\$ (80,430)	\$ (247,301)	\$ 99,481
Add:					
Net Profit or (Loss) for the Year	(39,908)	(88,814)	(166,871)	346,782	306,211
	<u>\$ 9,634</u>	<u>\$ (80,430)</u>	<u>\$ (247,301)</u>	<u>\$ 99,481</u>	<u>\$405,692</u>
Deduct:					
Dividends Paid on Preferred Stock	1,250	—	—	—	26,041
BALANCE AT CLOSE OF YEAR	<u><u>\$ 8,384</u></u>	<u><u>\$ (80,430)</u></u>	<u><u>\$ (247,301)</u></u>	<u><u>\$ 99,481</u></u>	<u><u>\$379,651</u></u>

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AMERICAN TRACTOR CORPORATION, CHURUBUSCO, INDIANA

COMPARATIVE STATEMENT OF PROFIT AND LOSS

For the Year Ended December 31, 1952, the Eight Months Period Ended August 31, 1953, the Years Ended August 31, 1954 and August 31, 1955, and the Eleven Months Period Ended July 31, 1956**

(See notes to financial statements)

	Year Ended December 31, 1952	Eight Months Period Ended August 31, 1953	Year Ended August 31, 1954	Year Ended August 31, 1955	Eleven Months Period Ended July 31, 1956** (Unaudited)
NET SALES	<u>\$3,455,713</u>	<u>\$1,701,863</u>	<u>\$2,264,237</u>	<u>\$5,279,628</u>	<u>\$9,177,007</u>
COST OF SALES:					
Inventory—Beginning of Period	\$ 731,814	\$ 805,753	\$ 649,610	\$ 674,839	\$1,317,859
Material Purchases	2,556,554	1,005,486	1,382,295	3,652,355	6,337,648
Direct Labor	102,437	54,869	140,935	384,342	666,213
Factory Expenses	591,731	328,675	495,946	784,843	1,482,230
	<u>\$3,982,536</u>	<u>\$2,194,783</u>	<u>\$2,668,786</u>	<u>\$5,496,379</u>	<u>\$9,803,950</u>
Inventory—End of Period	805,753	649,610	674,839	1,317,859	2,362,121
Total Cost of Sales	<u>\$3,176,783</u>	<u>\$1,545,173</u>	<u>\$1,993,947</u>	<u>\$4,178,520</u>	<u>\$7,441,829</u>
GROSS PROFIT ON SALES	<u>\$ 278,930</u>	<u>\$ 156,690</u>	<u>\$ 270,290</u>	<u>\$1,101,108</u>	<u>\$1,735,178</u>
SELLING, GENERAL AND ADMINISTRATIVE EXPENSES	<u>329,339</u>	<u>224,038</u>	<u>381,470</u>	<u>633,049</u>	<u>1,042,508</u>
NET OPERATING PROFIT OR (LOSS)	<u>\$ (50,409)</u>	<u>\$ (67,348)</u>	<u>\$ (111,180)</u>	<u>\$ 468,059</u>	<u>\$ 692,670</u>
OTHER INCOME	10,287	3,011	6,131	17,803	74,802
	<u>\$ (40,122)</u>	<u>\$ (64,337)</u>	<u>\$ (105,049)</u>	<u>\$ 485,862</u>	<u>\$ 767,472</u>
OTHER DEDUCTIONS:					
Provision for Doubtful Accounts	\$ 402	\$ 9,406	\$ 29,907	\$ 5,995	\$ —
Interest and Debt Expense	23,971	15,071	31,789	62,446	120,750
Miscellaneous	—	—	126	1,319	9,101
Total Other Deductions	<u>\$ 24,373</u>	<u>\$ 24,477</u>	<u>\$ 61,822</u>	<u>\$ 69,760</u>	<u>\$ 129,851</u>
NET PROFIT OR (LOSS) BEFORE FEDERAL INCOME TAXES	<u>\$ (64,495)</u>	<u>\$ (88,814)</u>	<u>\$ (166,871)</u>	<u>\$ 416,102</u>	<u>\$ 637,621</u>
FEDERAL INCOME TAXES	24,587*	—	—	69,320**	331,410
NET PROFIT OR (LOSS)	<u>\$ (39,908)</u>	<u>\$ (88,814)</u>	<u>\$ (166,871)</u>	<u>\$ 346,782</u>	<u>\$ 306,211</u>

* Denotes loss carry-back tax refund.

** The federal income tax for the year ended August 31, 1955 is \$127,610 less than the tax normally attributable to net profits for that

[fol. 65]

(See notes to financial statements)

	Year Ended December 31, 1953	Eight Months Period Ended August 31, 1953	Year Ended August 31, 1954	Year Ended August 31, 1955	Eleven Months Period Ended July 31, 1956*** (Unaudited)
NET SALES	<u>\$3,455,713</u>	<u>\$1,701,863</u>	<u>\$2,264,237</u>	<u>\$5,279,628</u>	<u>\$9,177,007</u>
COST OF SALES:					
Inventory—Beginning of Period	\$ 731,814	\$ 805,753	\$ 649,610	\$ 674,839	\$1,317,859
Material Purchases	2,556,554	1,005,486	1,382,295	3,652,355	6,337,648
Direct Labor	102,437	54,869	140,935	384,342	666,213
Factory Expenses	591,731	328,675	495,946	784,843	1,482,230
	<u>\$3,982,536</u>	<u>\$2,194,783</u>	<u>\$2,668,786</u>	<u>\$5,496,379</u>	<u>\$9,803,950</u>
Inventory—End of Period	805,753	649,610	674,839	1,317,859	2,362,121
Total Cost of Sales	<u>\$3,176,783</u>	<u>\$1,545,173</u>	<u>\$1,993,947</u>	<u>\$4,178,520</u>	<u>\$7,441,829</u>
GROSS PROFIT ON SALES	<u>\$ 278,930</u>	<u>\$ 156,690</u>	<u>\$ 270,290</u>	<u>\$1,101,108</u>	<u>\$1,735,178</u>
SELLING, GENERAL AND ADMINISTRATIVE EXPENSES	<u>329,339</u>	<u>224,038</u>	<u>381,470</u>	<u>633,049</u>	<u>1,042,508</u>
NET OPERATING PROFIT OR (LOSS)	<u>\$ (50,409)</u>	<u>\$ (67,348)</u>	<u>\$ (111,180)</u>	<u>\$ 468,059</u>	<u>\$ 692,670</u>
OTHER INCOME	10,287	3,011	6,131	17,803	74,802
	<u>\$ (40,122)</u>	<u>\$ (64,337)</u>	<u>\$ (105,049)</u>	<u>\$ 485,862</u>	<u>\$ 767,472</u>
OTHER DEDUCTIONS:					
Provision for Doubtful Accounts	\$ 402	\$ 9,406	\$ 29,907	\$ 5,995	\$ —
Interest and Debt Expense	23,971	15,071	31,789	62,446	120,750
Miscellaneous	—	—	126	1,319	9,101
Total Other Deductions	<u>\$ 24,373</u>	<u>\$ 24,477</u>	<u>\$ 61,822</u>	<u>\$ 69,760</u>	<u>\$ 129,851</u>
NET PROFIT OR (LOSS) BEFORE FEDERAL INCOME TAXES	<u>\$ (64,495)</u>	<u>\$ (88,814)</u>	<u>\$ (166,871)</u>	<u>\$ 416,102</u>	<u>\$ 637,621</u>
FEDERAL INCOME TAXES	24,587*	—	—	69,320**	331,410
NET PROFIT OR (LOSS)	<u><u>\$ (39,908)</u></u>	<u><u>\$ (88,814)</u></u>	<u><u>\$ (166,871)</u></u>	<u><u>\$ 346,782</u></u>	<u><u>\$ 306,211</u></u>

* Denotes loss carry-back tax refund.

** The federal income tax for the year ended August 31, 1955 is \$127,610 less than the tax normally applicable to net profit for that year, due to the net operating loss carry-over from prior periods.

*** Unaudited period. All known adjustments necessary to a fair statement of the operating results for the said period have been included.

AMERICAN TRACTOR CORPORATION, CHURUBUSCO, INDIANA

SUPPLEMENTARY PROFIT AND LOSS INFORMATION

For the Year Ended December 31, 1952, The Eight Months Period Ended August 31, 1953, the Years Ended August 31, 1954 and August 31, 1955, and the Eleven Months Period Ended July 31, 1956

Item	COLUMN B Charged directly to profit and loss		COLUMN C Charged to other accounts		COLUMN D Total
	(1)	(2)	(1)	(2)	
	To cost of goods sold or operating expenses	Other	Amount	Amount	
1. MAINTENANCE AND REPAIRS					
Year Ended December 31, 1952	\$ 21,839	68	None		\$ 21,907
Eight Months Ended August 31, 1953	7,754	216	None		7,970
Year Ended August 31, 1954	21,689	337	None		22,026
Year Ended August 31, 1955	44,926	448	None		45,374
*Eleven Months Ended July 31, 1956	129,990	4,227	None		134,217
2. DEPRECIATION, DEPLETION, AMORTIZATION OF FIXED AND INTANGIBLE ASSETS (Note 3)					
Year Ended December 31, 1952	\$ 14,458	\$ 4,274	None		\$ 18,732
Eight Months Ended August 31, 1953	14,427	3,446	None		17,873
Year Ended August 31, 1954	27,263	6,214	None		33,477
Year Ended August 31, 1955	42,019	7,482	None		49,501
*Eleven Months Ended July 31, 1956	52,566	10,228	None		62,794
3. TAXES OTHER THAN INCOME AND EXCESS PROFITS TAXES					
Year Ended December 31, 1952	\$ 21,850	\$11,632	None		\$ 33,482
Eight Months Ended August 31, 1953	12,553	8,622	None		21,175
Year Ended August 31, 1954	25,646	13,182	None		38,828
Year Ended August 31, 1955	32,546	16,076	None		48,622
*Eleven Months Ended July 31, 1956	65,162	32,555	None		97,717
(Comprised almost entirely of regularly recurring payroll and property taxes)					
4. MANAGEMENT AND SERVICE CONTRACT FEES					
Year Ended December 31, 1952	None	None	None		None
Eight Months Ended August 31, 1953	None	None	None		None
Year Ended August 31, 1954	None	None	None		None
Year Ended August 31, 1955	None	None	None		None
*Eleven Months Ended July 31, 1956	None	None	None		None
5. RENTS AND ROYALTIES					
Year Ended December 31, 1952	\$ 4,015	None	None		\$ 4,015
Eight Months Ended August 31, 1953	3,000	None	None		3,000
Year Ended August 31, 1954	3,895	None	None		3,895
Year Ended August 31, 1955	2,204	None	None		2,204
*Eleven Months Ended July 31, 1956	60,837	5,902	None		66,739
6. AMORTIZATION OF ORIGINAL ENGINEERING AND DEVELOPMENT COST					
Year Ended December 31, 1952	\$ 20,000	None	None		\$ 20,000
Eight Months Ended August 31, 1953	13,333	None	None		13,333

COLUM A

COLUM B
Charged directly to
profit and lossCOLUM C
Charged to
other accounts

COLUM D

Item	(1) To cost of goods sold or operating expenses	(2) Other	(1) Account	(2) Amount	Total
1. MAINTENANCE AND REPAIRS					
Year Ended December 31, 1952	\$ 21,839	\$ 68		None	\$ 21,907
Eight Months Ended August 31, 1953	7,754	216		None	7,970
Year Ended August 31, 1954	21,689	337		None	22,026
Year Ended August 31, 1955	44,926	448		None	45,374
*Eleven Months Ended July 31, 1956	129,990	4,227		None	134,217
2. DEPRECIATION, DEPLETION, AMORTIZATION OF FIXED AND INTANGIBLE ASSETS (Note 3)					
Year Ended December 31, 1952	\$ 14,458	\$ 4,274		None	\$ 18,732
Eight Months Ended August 31, 1953	14,427	3,446		None	17,873
Year Ended August 31, 1954	27,263	6,214		None	33,477
Year Ended August 31, 1955	42,019	7,482		None	49,501
*Eleven Months Ended July 31, 1956	52,566	10,228		None	62,794
3. TAXES OTHER THAN INCOME AND EXCESS PROFITS TAXES					
Year Ended December 31, 1952	\$ 21,850	\$11,632		None	\$ 33,482
Eight Months Ended August 31, 1953	12,553	8,622		None	21,175
Year Ended August 31, 1954	25,646	13,182		None	38,828
Year Ended August 31, 1955	32,546	16,076		None	48,622
*Eleven Months Ended July 31, 1956	65,162	32,555		None	97,717
(Comprised almost entirely of regularly recurring payroll and property taxes)					
4. MANAGEMENT AND SERVICE CONTRACT FEES					
Year Ended December 31, 1952	None	None		None	None
Eight Months Ended August 31, 1953	None	None		None	None
Year Ended August 31, 1954	None	None		None	None
Year Ended August 31, 1955	None	None		None	None
*Eleven Months Ended July 31, 1956	None	None		None	None
5. RENTS AND ROYALTIES					
Year Ended December 31, 1952	\$ 4,015	None		None	\$ 4,015
Eight Months Ended August 31, 1953	3,000	None		None	3,000
Year Ended August 31, 1954	3,895	None		None	3,895
Year Ended August 31, 1955	2,204	None		None	2,204
*Eleven Months Ended July 31, 1956	60,837	5,902		None	66,739
6. AMORTIZATION OF ORIGINAL ENGINEERING AND DEVELOPMENT COST					
Year Ended December 31, 1952	\$ 20,000	None		None	\$ 20,000
Eight Months Ended August 31, 1953	13,333	None		None	13,333
Year Ended August 31, 1954	20,000	None		None	20,000
Year Ended August 31, 1955	20,000	None		None	20,000
*Eleven Months Ended July 31, 1956	18,333	None		None	18,333

Tooling is amortized equally over two to four year periods from date of acquisition. Subsequent engineering and development expense is charged off as incurred, or, when deferred until new models are introduced for sale, then immediately charged off in the year of such introduction.

* Unaudited period.

AMERICAN TRACTOR CORPORATION, CHURUBUSCO, INDIANA

NOTES TO FINANCIAL STATEMENTS

As at August 31, 1955 and July 31, 1956

1. Accounts and notes receivable are shown net after a reserve for doubtful accounts of \$10,000. Accounts aggregating \$462,067 at August 31, 1955 and \$361,176 at July 31, 1956 had been pledged to secure bank loans.
2. Merchandise inventories are valued at cost, on first-in, first-out method. Opening and closing inventories for each of the periods reflected by the financial statements were determined by physical count of all merchandise at the close of each period, except at July 31, 1956, on which date only finished tractors were counted and book figures were used to represent the value of raw materials, parts and supplies then on hand.

The operating results for the eleven month period ended July 31, 1956 may be affected by the physical inventory taken August 31, 1956 which has not yet been evaluated and reconciled with the books of account. Such year end adjustments of book value to physical inventory values have not been material in amount in past years.

The inventory is classified as follows:

	8/31/55	7/31/56
Finished Tractors and Accessories	\$ 75,636	\$ 475,939
Steel	168,154	222,700
Other Raw Materials and Parts	1,074,069	1,632,332
Shop Supplies and Miscellaneous	14,226	71,004
	<u>\$1,332,085</u>	<u>\$2,401,975</u>

3. Property, plant and equipment costs and accumulated depreciation are summarized hereunder:

	1955	1956	Depreciation Rates Per Annum
Land	\$ 21,506	\$ 21,506	—
Buildings	269,975	645,330	3%
Building construction in progress	165,644	321,867	—
Land improvements	19,227	50,996	10
Furniture and fixtures	55,655	91,991	10
Machinery and equipment	299,398	397,596	10
Autos, trucks and tractors	56,692	54,527	25
Total Cost	<u>\$888,097</u>	<u>\$1,583,813</u>	
Less: Accumulated depreciation	<u>109,142</u>	<u>165,645</u>	
Net Depreciated Value	<u>\$778,955</u>	<u>\$1,418,168</u>	

All expenditures for maintenance and repairs are charged to profit and loss as incurred. Additions and betterments are capitalized. Properties retired or otherwise disposed of are removed from the property accounts and the accumulated depreciation thereon is eliminated from the respective depreciation reserve accounts. Gains or losses resulting from retirements or dispositions of fixed assets are credited or charged to profit and loss.

All fixed assets were mortgaged to secure the indebtedness owing to The Marine Midland Trust Company of New York, and Edward L. Elliott, or order, at August 31, 1955, and are mortgaged to secure the indebtedness owing to The Marine Midland Trust Company of New York, at July 31, 1956, referred to hereinafter under notes 5 and 6.

4. Represents principally, notes owing to The Marine Midland Trust Company of New York, secured by pledges of accounts receivable aggregating \$462,067 at August 31, 1955 and \$361,176 at July 31, 1956.
5. Due to The Marine Midland Trust Company of New York, secured by a first real estate mortgage on plant and plant site, and by a chattel mortgage on all machinery owned or hereafter acquired. \$900,000 balance at July 31, 1956 is payable \$9,000 per month for twelve months, commencing September 30, 1956, \$16,500 per month for next year, \$18,000 per month thereafter. Interest payable monthly in addition at rate of 5% per annum on reducing principal. Accelerated principal payments, equal to 25% of net profits after taxes for the last preceding fiscal year, are payable commencing November 30, 1957 and each year thereafter. Such accelerated annual payments shall not exceed the aggregate amount of monthly principal payments required in each such preceding fiscal year.

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Autos, trucks and tractors.....	56,692	54,527	25
Total Cost	<u>\$888,097</u>	<u>\$1,583,813</u>	
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5. Due to The Marine Midland Trust Company of New York, secured by a first real estate mortgage on plant and plant site, and by a chattel mortgage on all machinery owned or hereafter acquired. \$900,000 balance at July 31, 1956 is payable \$9,000 per month for twelve months, commencing September 30, 1956, \$16,500 per month for next year, \$18,000 per month thereafter. Interest payable monthly in addition at rate of 5% per annum on reducing principal. Accelerated principal payments, equal to 25% of net profits after taxes for the last preceding fiscal year, are payable commencing November 30, 1957 and each year thereafter. Such accelerated annual payments shall not exceed the aggregate amount of monthly principal payments required in each such preceding fiscal year.
6. Principally comprised of \$250,000 owing to Edward L. Elliott, or order, of New York, secured by second mortgage on all fixed assets of the company.

AMERICAN TRACTOR CORPORATION, CHURUBUSCO, INDIANA

NOTES TO FINANCIAL STATEMENTS—(Continued)

7. No provision is made in the statement of financial condition for approximately \$95,000 in liabilities at August 31, 1955, and approximately \$50,000 in liabilities at July 31, 1956, under new building construction contracts for work not completed on the respective dates.

No liability is reflected in the statement of financial condition for the balance of approximately \$542,000 owing at July 31, 1956, or \$712,000 at September 30, 1956, due in future periods under leases of machinery and equipment, which leases also contain options to purchase. Fixed rentals hereafter are estimated to average \$213,000 per annum during the terms of the leases in effect. Such rentals paid in eleven months ended July 31, 1956 have been charged to operating expenses. Conditional sales contracts in the amount of \$1,522,061, on which the company is contingently liable for \$1,199,044, had been sold to The Marine Midland Trust Company of New York at July 31, 1956.

8. The authorized preferred capital stock is comprised of 250,000 shares of \$20 par value, 5% convertible, cumulative; of which 62,500 shares were issued and outstanding at July 31, 1956.

12,500 of such outstanding preferred shares may be converted into common stock at the conversion price of \$20.00 per share of common stock, and 50,000 outstanding preferred shares may be converted into 62,500 shares of common stock at the conversion price of \$16.00 per share.

The issued and outstanding shares are callable at any time on 30 day notice at \$21.00 per share, have priority over common stock, and are entitled to \$21.00 per share in event of voluntary liquidation or dissolution, and \$20.00 per share in event of involuntary liquidation or dissolution.

9. The authorized common capital stock is comprised of 2,000,000 shares of 25¢ par value, of which 1,099,390 shares at August 31, 1955, and 1,107,704 shares at July 31, 1956, were issued and outstanding.

During the period from October 12, 1953 (Mr. Milligan's date of employment), to July 31, 1956, an aggregate of 10,000 shares of common stock was issued to D. A. Milligan, Vice President in Charge of Sales, as compensation pursuant to his employment contract. The market price for such shares at the time of issue ranged from \$3.50 to \$14 per share. 2,000 shares, then having market price of approximately \$12 per share, were issued to him on October 12, 1956. His employment contract has been cancelled.

All options heretofore granted to key employees have been cancelled without exercise. 2,317 shares were issued to general employees pursuant to an Employees Stock Purchase Plan, cancelled on October 4, 1956. The prices paid ranged from approximately \$11.50 to \$13 per share.

75,000 shares of authorized but unissued common capital stock were reserved at July 31, 1956 for conversion privileges of preferred stock shareholders, and 90,000 shares were reserved at July 31, 1956 for issuance upon the exercise of 50,000 common stock purchase warrants entitling each warrant to purchase 1 4/5 shares of unissued common stock at \$16.00 per share.

10. The loan agreements applicable to the indebtedness referred to under Notes 4, 5 and 6 contain certain restrictions which prohibit payment of dividends on common capital stock while any portion of such indebtedness remains unpaid. No liability has been shown for accumulated preferred stock dividends, not declared, amounting to \$5,208 at July 31, 1956.

J. L. CASE COMPANY

PRO FORMA BALANCE SHEET JULY 31, 1956 (Unaudited)

(Giving effect to the Merger of J. L. Case Company and American Tractor Corporation)

See notes and explanations attached

	<u>J. L. Case Company</u>	<u>American Tractor Corporation</u>	<u>Pro Forma Adjustments add or (deduct)</u>	<u>Pro Forma Combined July 31, 1956</u>
CURRENT ASSETS:				
Cash	\$ 4,659,794	\$ 281,556	(\$ 1,312,500)	\$ 3,628,850
Notes and accounts receivable, less reserve	69,418,566	1,032,607		70,451,173
Inventories	39,723,815	2,401,975		42,125,790
	<u>\$113,802,175</u>	<u>\$3,716,138</u>	<u>(\$ 1,312,500)</u>	<u>\$116,205,813</u>
OTHER ASSETS	<u>\$ 264,354</u>	<u>\$ 8,971</u>		<u>\$ 273,325</u>
PROPERTY, PLANT AND EQUIPMENT, Net of Accumulated Depreciation:				
Land	\$ 2,364,417	\$ 21,505		\$ 2,385,922
Land improvements	—	44,131		44,131
Buildings and building equipment	12,064,302	611,315	\$ 994,634	13,670,251
Machinery and equipment	14,564,459	324,372	469,305	15,358,136
Patterns	1,076,140	—		1,076,140
Furniture and fixtures	811,623	72,261	(1,025)	882,859
Autos, trucks, tractors and planes	216,275	74,502	10,346	301,123
Construction in progress	895,008	321,867		1,216,875
	<u>\$ 31,992,224</u>	<u>\$4,469,953</u>	<u>\$ 1,473,260</u>	<u>\$ 34,935,437</u>
PREPAID EXPENSES, PATENTS AND DEFERRED CHARGES:				
Prepaid insurance premiums, etc.	\$ 909,653	\$ 41,321		\$ 950,974
Patents, designs, devices, etc.	1	—		1
Engineering and development ex- pense	—	72,500		72,500
Pattern and die expense	—	271,036		271,036
Other deferred charges	—	96,857		96,857
	<u>\$ 909,654</u>	<u>\$ 481,714</u>		<u>\$ 1,391,368</u>

EXCESS OF COST OF ASSETS ACQUIRED

	<u>Company</u>	<u>Corporation</u>	<u>add or (deduct)</u>	<u>1956</u>
CURRENT ASSETS:				
Cash	\$ 4,659,794	\$ 281,556	(\$ 1,312,500)	\$ 3,628,850
Notes and accounts receivable, less reserve	69,418,566	1,032,607		70,451,173
Inventories	39,723,815	2,401,975		42,125,790
	<u>\$113,802,175</u>	<u>\$3,716,138</u>	<u>(\$ 1,312,500)</u>	<u>\$116,205,813</u>
OTHER ASSETS	<u>\$ 264,354</u>	<u>\$ 8,971</u>		<u>\$ 273,325</u>

**PROPERTY, PLANT AND EQUIPMENT,
Net of Accumulated Depreciation:**

Land	\$ 2,364,417	\$ 21,505		\$ 2,385,922
Land improvements	—	44,131		44,131
Buildings and building equipment	12,064,302	611,315	\$ 994,634	13,670,251
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Patterns	1,076,140	—		1,076,140
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	<u>\$ 31,992,224</u>	<u>\$1,469,953</u>	<u>\$ 1,473,260</u>	<u>\$ 34,935,437</u>

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Prepaid insurance premiums, etc.	\$ 909,653	\$ 41,321		\$ 950,974
Patents, designs, devices, etc.	1	—		1
Engineering and development ex- pense	—	72,500		72,500
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Other deferred charges	—	96,857		96,857
	<u>\$ 909,654</u>	<u>\$ 481,714</u>		<u>\$ 1,391,368</u>

**EXCESS OF COST OF ASSETS ACQUIRED
OVER ASSIGNED VALUE THEREOF
(Note 5)**

	\$ —	\$ —	\$11,990,665	\$ 11,990,665
	<u>\$146,968,407</u>	<u>\$5,676,776</u>	<u>\$12,151,425</u>	<u>\$164,796,608</u>

J. I. CASE COMPANY

PRO FORMA BALANCE SHEET JULY 31, 1956 (Unaudited)

(Giving effect to the Merger of J. I. Case Company and American Tractor Corporation)

See notes and explanations attached

	<u>J. I. Case Company</u>	<u>American Tractor Corporation</u>	<u>Pro Forma Adjustments add or (deduct)</u>	<u>Pro Forma Combined July 31, 1956</u>
CURRENT LIABILITIES:				
Notes payable to banks	\$ 27,450,000	\$ 190,639		\$ 27,640,639
Current instalments on long-term debt	—	99,000		99,000
Other notes payable	—	174,637		174,637
Accounts payable	2,539,465	1,412,659		3,952,124
Accrued liabilities	594,573	141,778		736,351
Dividend payable on preferred stock	162,586	—		162,586
Federal and other taxes on income	705,678	331,410		1,037,088
	<u>\$ 31,452,302</u>	<u>\$ 2,350,123</u>		<u>\$ 33,802,425</u>
LONG-TERM DEBT:				
3½% sinking fund debentures due February 1, 1978 (annual sinking fund payments of \$630,000 commence in 1958)	\$ 25,000,000	\$ —		\$ 25,000,000
Real estate mortgage payable	—	801,000		801,000
	<u>\$ 25,000,000</u>	<u>\$ 801,000</u>		<u>\$ 25,801,000</u>
STOCKHOLDERS' EQUITY (Note 3):				
Preferred Stock:				
7% cumulative, \$100 par value	\$ 9,290,600	\$ —		\$ 9,290,600
Issued—92,906 shares				
6½% second cumulative, \$7 par value	—	—	\$ 7,753,928	7,753,928
Issued—1,107,704 shares				
5% convertible, \$20 par value	—	1,250,000	(1,250,000)	—
Common Stock:				
\$12.50 par value	28,284,575	—	6,923,150	35,207,725
Issued—				
Before merger 2,262,766 shares				
After merger 2,816,618 shares				
\$.25 par value	—	276,926	(276,926)	—
Capital contributed by stockholders in excess of par value of securities	10,008,314	619,076	(619,076)	10,008,314
Accumulated earnings retained for reinvestment in the business including, for J. I. Case Company, inventory loss and contingency reserves aggregated—\$12,075,000	12,075,000	270,651	(270,651)	12,075,000

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	J. I. Case Company	Tractor Corporation	Adjustments add or (deduct)	July 31, 1956
CURRENT LIABILITIES:				
Notes payable to banks	\$ 27,450,000	\$ 190,639		\$ 27,640,639
Current instalments on long-term debt	—	99,000		99,000
Other notes payable	—	174,637		174,637
Accounts payable	2,539,465	1,412,659		3,952,124
Accrued liabilities	594,573	141,778		736,351
Dividend payable on preferred stock	162,586	—		162,586
Federal and other taxes on income	705,678	331,410		1,037,088
	<u>\$ 31,452,302</u>	<u>\$2,350,123</u>		<u>\$ 33,802,425</u>
LONG-TERM DEBT:				
3½% sinking fund debentures due February 1, 1978 (annual sinking fund payments of \$630,000 commence in 1958)	\$ 25,000,000	\$ —		\$ 25,000,000
Real estate mortgage payable	—	801,000		801,000
	<u>\$ 25,000,000</u>	<u>\$ 801,000</u>		<u>\$ 25,801,000</u>
STOCKHOLDERS' EQUITY (Note 3):				
Preferred Stock:				
7% cumulative, \$100 par value	\$ 9,290,600	\$ —		\$ 9,290,600
Issued—92,906 shares				
6½% second cumulative, \$7 par value	—	—	\$ 7,753,928	7,753,928
Issued — 1,107,704 shares				
5% convertible, \$20 par value	—	1,250,000	(1,250,000)	—
Common Stock:				
\$12.50 par value	28,284,575	—	6,923,150	35,207,725
Issued—				
Before merger 2,262,766 shares				
After merger 2,816,618 shares				
\$.25 par value	—	276,926	(276,926)	—
Capital contributed by stock- holders in excess of par value of securities	10,008,314	619,076	(619,076)	10,008,314
Accumulated earnings retained for reinvestment in the busi- ness including, for J. I. Case Company, inventory loss and contingency reserves aggregat- ing \$12,975,000	42,932,616	379,651	(379,651)	42,932,616
	<u>\$ 90,516,105</u>	<u>\$2,525,653</u>	<u>\$12,151,425</u>	<u>\$105,193,183</u>
Contingent liabilities and commitments (Note 4)				
	<u>\$146,968,407</u>	<u>\$5,676,776</u>	<u>\$12,151,425</u>	<u>\$164,796,608</u>

J. I. CASE COMPANY

NOTES TO TRANSACTIONS GIVEN EFFECT TO IN PRO FORMA BALANCE SHEET

as at July 31, 1956 (Unaudited)

1. The foregoing pro forma balance sheet as at July 31, 1956 has been prepared from the unaudited balance sheets of J. I. Case Company and American Tractor Corporation set forth in more detail elsewhere in this proxy statement, and should be read in conjunction with those balance sheets and notes thereto. The pro forma balance sheet does not reflect the possible exercise of outstanding ATC stock purchase warrants and stock options or the conversion of outstanding shares of ATC Convertible Preferred Stock Series 55-1 and 56-1. Such pro forma balance sheet at July 31, 1956 gives effect to the following transactions relating to the merger of J. I. Case Company and American Tractor Corporation, all as more fully described elsewhere herein:

a. The outstanding shares of 5% Convertible Preferred Stock of ATC will be redeemed at a price of \$21 per share.

b. The Board of Directors of Case has determined that the minimum fair value of the net assets of ATC to be acquired in the merger is \$14,757,068. Based upon the number of shares of ATC Common Stock outstanding on July 31, 1956, and giving effect to the exchange of one share of new 6½ per cent Second Cumulative Preferred Stock and one-half share of Common Stock for each share of ATC Common Stock then outstanding, the following records the issuance of Case Preferred and Common Stocks:

1,107,704 shares of 6½% Second Cumulative Preferred Stock, \$7 par value	\$ 7,753,928
553,852 shares of Common Stock, \$12.50 par value	6,923,150
	<u>\$14,677,078</u>

The net assets of ATC will become the net assets of Case.

c. The property, plant and equipment of ATC were valued by the Board of Directors of Case on the basis of an appraisal by the firm of W. F. MacConnell & Co. of Cincinnati, Ohio. The property, plant and equipment of ATC which will become assets of Case are restated to give effect to the net increase in value as set forth in that appraisal.

2. On September 24, 1956 Case purchased 50,000 shares of 5% Convertible Preferred Stock, Series 56-2 of ATC at \$20 per share and 50,000 common stock purchase warrants at one cent each. The subsequent redemption of such 5% Cumulative Preferred Stock, Series 56-2 and cancellation of the warrants, pursuant to the plan of merger, will have no effect on the accompanying pro forma balance sheet.

3. For information regarding restriction on payment of dividends on common stock and revision of Case stock option plan, see captions "Certain Further Restrictions" and "Stock Option" respectively.

4. Case had no significant commitments or contingent liabilities at July 31, 1956 or September 30, 1956. Information regarding commitments and contingent liabilities of ATC at July 31, 1956 and September 30, 1956 is set forth in Note 7 to ATC financial statements in this proxy statement.

5. The Case management will adopt a plan of amortization, over some period not in excess of 20 years, of the Excess of Cost of Assets Acquired Over Assigned Value Thereof starting with the fiscal year beginning November 1, 1957. Such plan will provide for annual charges determined by the extent of the accomplished degree of integration of the companies' operations.

PLAN OF MERGER

CERTIFICATE OF CONSOLIDATION

of

AMERICAN TRACTOR CORPORATION

and

J. I. CASE COMPANY

into

J. I. CASE COMPANY

(Pursuant to Section 91 of the Stock Corporation Law of New York.)

ARTICLES OF MERGER

of

AMERICAN TRACTOR CORPORATION

into

J. I. CASE COMPANY

(Pursuant to Section 180.68 of Wisconsin Statutes 1955)

J. I. CASE COMPANY (hereinafter sometimes called "the Corporation"), a Wisconsin corporation, and AMERICAN TRACTOR CORPORATION (hereinafter sometimes called "ATC"), a New York corporation, desiring to effect the merger of ATC into the Corporation pursuant to the provisions of Section 180.68 of the Wisconsin Statutes 1955 and the consolidation of ATC with the Corporation pursuant to the provisions of Section 91 of the Stock Corporation Law of New York, and the Boards of Directors of each such corporation having adopted a Plan of Merger as set forth and included in these Articles of Merger and Certificate of Consolidation, their respective Presidents or one of their respective Vice Presidents and their respective Secretaries or one of their respective Assistant Secretaries do hereby certify:

Article 1. Corporations Proposing to Merge and Consolidate. The corporations to be

of
AMERICAN TRACTOR CORPORATION

and

J. I. CASE COMPANY

into

J. I. CASE COMPANY

(Pursuant to Section 91 of the Stock Corporation Law of New York)

ARTICLES OF MERGER

of

AMERICAN TRACTOR CORPORATION

into

J. I. CASE COMPANY

(Pursuant to Section 180.68 of Wisconsin Statutes 1955)

J. I. CASE COMPANY (hereinafter sometimes called "the Corporation"), a Wisconsin corporation, and AMERICAN TRACTOR CORPORATION (hereinafter sometimes called "ATC"), a New York corporation, desiring to effect the merger of ATC into the Corporation pursuant to the provisions of Section 180.68 of the Wisconsin Statutes 1955 and the consolidation of ATC with the Corporation pursuant to the provisions of Section 91 of the Stock Corporation Law of New York, and the Boards of Directors of each such corporation having adopted a Plan of Merger as set forth and included in these Articles of Merger and Certificate of Consolidation, their respective Presidents or one of their respective Vice Presidents and their respective Secretaries or one of their respective Assistant Secretaries do hereby certify:

Article 1. Corporations Proposing to Merge and Consolidate. The corporations to be included in the merger and consolidation are J. I. Case Company, a Wisconsin corporation, and American Tractor Corporation, a New York corporation. J. I. Case Company, a Wisconsin corporation and one of the constituent corporations, will survive the merger and consolidation. The name of such surviving corporation will continue to be "J. I. Case Company" and its principal office will continue to be at 700 State Street, Racine, Wisconsin.

J. I. Case Company was incorporated under the laws of the State of Wisconsin on February 25, 1880 as J. I. Case Threshing Machine Company, and was authorized to do business in the State of New York by certificate of authority of the Secretary of State of New York dated February 18, 1907.

The Certificate of Incorporation of American Tractor Corporation, which was incorporated under the Stock Corporation Law of New York as Washington Tractor & Farm Equipment Corp., was filed in the office of the Secretary of State of New York on July 19, 1948.

Article 2. Outstanding Shares of the Corporation and ATC. The Corporation had outstanding as of the date of the meeting of its stockholders to act on this merger and consolidation a total of 2,355,672 shares of capital stock, divided into 2,262,766 shares of Common Stock, par value \$12.50 a share, and 92,906 shares of 7% Cumulative Preferred Stock, par value \$100 a share. As of the date of filing these Articles of Merger and Certificate of Consolidation the Corporation had outstanding a total of 2,355,672 shares of capital stock, divided into 2,262,766 shares of Common Stock and 92,906 shares of 7% Cumulative Preferred Stock.

ATC had outstanding as of the date of the meeting of the stockholders to act on this merger and consolidation a total of _____ shares of capital stock, divided into _____ shares of Common Stock, par value 25¢ a share, and _____ shares of Convertible Preferred Stock, Series 55-1, 56-1 and 56-2. The _____ shares of Common Stock were entitled to vote on the merger and consolidation. Prior to the effective date of this merger and consolidation ATC will have redeemed all its outstanding shares of Convertible Preferred Stock, Series 55-1, 56-1 and 56-2. Accordingly, under the terms of the Certificate of Incorporation, as amended, of ATC such shares were not part of the capital stock of ATC entitled to vote on this merger and consolidation. As of the date of filing these Articles of Merger and Certificate of Consolidation ATC had outstanding a total of _____ shares of Common Stock.

Article 3. Changes in the Articles of Association of the Corporation. The following changes in the Articles of Association of the Corporation, the surviving corporation, are to be effected by this merger and consolidation:

(a) The provisions of Article 1 following the initial paragraph thereof are amended to read as follows:

"The business and purposes of such corporation are and shall be:

To manufacture, purchase, sell and repair all kinds of agricultural machinery, tools, implements, and farm equipment; all kinds of engines, motors, tractors, road machinery, wagons, motor vehicles, and other vehicles; all devices, attachments and equipment used or intended for use in connection therewith, and to produce, manufacture, buy, sell and deal in any and all materials used in connection with their manufacture, and to engage in any other lawful business for any purpose whatever for which corporations may be organized under Chapter 180, Wisconsin Business Corporation Law.

To apply for, obtain, register, lease or otherwise acquire, and to hold, use, own, operate, sell, license, assign or otherwise dispose of any trademarks, trade names, patents, inventions, improvements, processes and formulae used or usable in connection with the manufacture, production, sale or repair of any articles.

To engage in any and all lawful business whenever necessary, convenient or incidental to the exercise or attainment of any of the powers or purposes hereinbefore specified, excepting such as is forbidden by law.

The corporation shall have power to conduct its business in any of the states, territories or colonial possessions of the United States.

Article 2. Outstanding Shares of the Corporation and ATC. The Corporation had outstanding as of the date of the meeting of its stockholders to act on this merger and consolidation a total of 2,355,672 shares of capital stock, divided into 2,262,766 shares of Common Stock, par value \$12.50 a share, and 92,906 shares of 7% Cumulative Preferred Stock, par value \$100 a share. As of the date of filing these Articles of Merger and Certificate of Consolidation the Corporation had outstanding a total of 2,355,672 shares of capital stock, divided into 2,262,766 shares of Common Stock and 92,906 shares of 7% Cumulative Preferred Stock.

ATC had outstanding as of the date of the meeting of the stockholders to act on this merger and consolidation a total of _____ shares of capital stock, divided into _____ shares of Common Stock, par value 25¢ a share, and _____ shares of Convertible Preferred Stock, Series 55-1, 56-1 and 56-2. The _____ shares of Common Stock were entitled to vote on the merger and consolidation. Prior to the effective date of this merger and consolidation ATC will have redeemed all its outstanding shares of Convertible Preferred Stock, Series 55-1, 56-1 and 56-2. Accordingly, under the terms of the Certificate of Incorporation, as amended, of ATC such shares were not part of the capital stock of ATC entitled to vote on this merger and consolidation. As of the date of filing these Articles of Merger and Certificate of Consolidation ATC had outstanding a total of _____ shares of Common Stock.

Article 3. Changes in the Articles of Association of the Corporation. The following changes in the Articles of Association of the Corporation, the surviving corporation, are to be effected by this merger and consolidation:

(a) The provisions of Article 1 following the initial paragraph thereof are amended to read as follows:

"The business and purposes of such corporation are and shall be:

To manufacture, purchase, sell and repair all kinds of agricultural machinery, tools, implements, and farm equipment; all kinds of engines, motors, tractors, road machinery, wagons, motor vehicles, and other vehicles; all devices, attachments and equipment used or intended for use in connection therewith, and to produce, manufacture, buy, sell and deal in any and all materials used in connection with their manufacture, and to engage in any other lawful business for any purpose whatever for which corporations may be organized under Chapter 180, Wisconsin Business Corporation Law.

To apply for, obtain, register, lease or otherwise acquire, and to hold, use, own, operate, sell, license, assign or otherwise dispose of any trademarks, trade names, patents, inventions, improvements, processes and formulae used or usable in connection with the manufacture, production, sale or repair of any articles.

To engage in any and all lawful business whenever necessary, convenient or incidental to the exercise or attainment of any of the powers or purposes hereinbefore specified, excepting such as is forbidden by law.

The corporation shall have power to conduct its business in any of the states, territories or colonial possessions of the United States and in foreign countries, and to have one or more offices outside of the state of Wisconsin; and to hold, purchase, mortgage and convey real and personal property both in and out of the state of Wisconsin."

(b) Article 3 is amended to read as follows:

"The capital stock of this corporation shall consist of an aggregate of Five Million Four Hundred One Thousand Eight Hundred Twenty-Five (5,401,825) shares of capital stock, divided into One Hundred One Thousand Eight Hundred Twenty-Five (101,825) shares of Preferred Stock, par value One Hundred Dollars (\$100) each, One Million Three Hundred Thousand (1,300,000) shares of 6½% Second Cumulative Preferred Stock, par value Seven Dollars (\$7) each, and Four Million (4,000,000) shares of Common Stock, par value Twelve Dollars and Fifty Cents (\$12.50) each.

The holders of the Preferred Stock shall be entitled to receive, when and as declared, from the surplus or net profits of the corporation, yearly dividends at the rate of seven per centum per annum, and no more, payable quarter-yearly on dates to be fixed by the By-laws. The dividends on the Preferred Stock shall be cumulative, and shall be payable before any dividends on the 6½% Second Cumulative Preferred Stock or on the Common Stock shall be paid or set apart, so that, if in any year dividends amounting to seven per centum shall not have been paid on the Preferred Stock, the deficiency shall be payable before any dividend shall be paid upon or set apart for the 6½% Second Cumulative Preferred Stock or for the Common Stock.

The holders of the 6½% Second Cumulative Preferred Stock shall be entitled to receive, when and as declared, from the surplus or net profits of the corporation, yearly dividends at the rate of six and one-half per centum, per annum, and no more, payable quarter-yearly on dates to be fixed by the By-laws. The dividends on the 6½% Second Cumulative Preferred Stock shall be cumulative, and shall be payable before any dividends on the Common Stock shall be paid or set apart, so that, if in any year dividends amounting to six and one-half per centum shall not have been paid thereon, the deficiency shall be payable before any dividend shall be paid upon or set apart for the Common Stock. Cash dividends on the 6½% Second Cumulative Preferred Stock shall accrue from the date of issue, if that be a dividend date, and otherwise from a date five days after the approval of the merger of American Tractor Corporation into the corporation by the stockholders of both such companies. Whenever all cumulative dividends on the Preferred Stock for all previous years shall have been declared and shall have become payable, and the accrued quarter-yearly installments on such stock for the current year shall have been declared, and the Company shall have paid such cumulative dividends for previous years and such accrued quarter-yearly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the 6½% Second Cumulative Preferred Stock, payable then or thereafter, out of any remaining surplus or net profits.

Whenever all cumulative dividends on the Preferred Stock and the 6½% Second Cumulative Preferred Stock for all previous years shall have been declared and shall have become payable, and the accrued quarter-yearly installments for the current year shall have been declared, and the Company shall have paid such cumulative dividends for previous years and such accrued quarter-yearly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the Common Stock, payable then or thereafter, out of any remaining surplus or net profits.

In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the corporation the holders of the Preferred Stock shall be entitled to

COMMON STOCK, PAR VALUE \$100.00 PER SHARE

The holders of the Preferred Stock shall be entitled to receive, when and as declared, from the surplus or net profits of the corporation, yearly dividends at the rate of seven per centum per annum, and no more, payable quarter-yearly on dates to be fixed by the By-laws. The dividends on the Preferred Stock shall be cumulative, and shall be payable before any dividends on the 6½ % Second Cumulative Preferred Stock or on the Common Stock shall be paid or set apart, so that, if in any year dividends amounting to seven per centum shall not have been paid on the Preferred Stock, the deficiency shall be payable before any dividend shall be paid upon or set apart for the 6½ % Second Cumulative Preferred Stock or for the Common Stock.

The holders of the 6½ % Second Cumulative Preferred Stock shall be entitled to receive, when and as declared, from the surplus or net profits of the corporation, yearly dividends at the rate of six and one-half per centum, per annum, and no more, payable quarter-yearly on dates to be fixed by the By-laws. The dividends on the 6½ % Second Cumulative Preferred Stock shall be cumulative, and shall be payable before any dividends on the Common Stock shall be paid or set apart, so that, if in any year dividends amounting to six and one-half per centum shall not have been paid thereon, the deficiency shall be payable before any dividend shall be paid upon or set apart for the Common Stock. Cash dividends on the 6½ % Second Cumulative Preferred Stock shall accrue from the date of issue, if that be a dividend date, and otherwise from a date five days after the approval of the merger of American Tractor Corporation into the corporation by the stockholders of both such companies. Whenever all cumulative dividends on the Preferred Stock for all previous years shall have been declared and shall have become payable, and the accrued quarter-yearly installments on such stock for the current year shall have been declared, and the Company shall have paid such cumulative dividends for previous years and such accrued quarter-yearly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the 6½ % Second Cumulative Preferred Stock, payable then or thereafter, out of any remaining surplus or net profits.

Whenever all cumulative dividends on the Preferred Stock and the 6½ % Second Cumulative Preferred Stock for all previous years shall have been declared and shall have become payable, and the accrued quarter-yearly installments for the current year shall have been declared, and the Company shall have paid such cumulative dividends for previous years and such accrued quarter-yearly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the Common Stock, payable then or thereafter, out of any remaining surplus or net profits.

In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the corporation, the holders of the Preferred Stock shall be entitled to be paid in full both the par amount of their shares and the unpaid dividends accrued

thereon, before any amount shall be paid to the holders of the 6½ % Second Cumulative Preferred Stock or of the Common Stock; and after the payment to the holders of the Preferred Stock of its par value, and the unpaid accrued dividends thereon, the holders of the 6½ % Second Cumulative Preferred Stock shall be entitled in the event of voluntary liquidation or dissolution or winding up to the amount of Seven Dollars and Thirty-five Cents (\$7.35) on their shares and in the event of involuntary liquidation or dissolution or winding up to the par amount of their shares, in each case with the amount of unpaid dividends accrued thereon, before any amount shall be paid to the holders of the Common Stock; and after such payments to the holders of Preferred Stock and 6½ % Second Cumulative Preferred Stock the remaining assets and funds shall be divided and paid to the holders of the Common Stock according to their respective shares.

Except as provided below, the corporation may redeem at its option the whole or any part (pro rata or by lot) of the 6½ % Second Cumulative Preferred Stock outstanding at any time by paying therefor in cash Seven Dollars and Thirty-five Cents (\$7.35) per share plus accrued unpaid dividends thereon to the date fixed for such redemption (herein called the "redemption price"), by mailing notice of such redemption to the holders of record of such 6½ % Second Cumulative Preferred Stock so to be redeemed at their respective addresses as the same may appear on the books of the corporation as of a date, not more than fifty days prior to the redemption date, as shall be established by the Board of Directors of the corporation. Such notice shall specify the time and place of redemption and shall be mailed at least thirty days prior to the date specified therein for redemption. So long as any shares of Preferred Stock are outstanding the corporation will not redeem any shares of 6½ % Second Cumulative Preferred Stock unless all dividends upon the Preferred Stock and the full dividends for the then current quarterly dividend period thereon shall have been paid or declared and a sum sufficient for the payment thereof set apart. Unless all dividends upon 6½ % Second Cumulative Preferred Stock shall have been paid and the full dividends thereon for the then current quarterly dividend period shall have been paid or declared and a sum sufficient for the payment thereof set apart, the corporation shall not redeem less than all outstanding shares of 6½ % Second Cumulative Preferred Stock.

If the aforesaid notice of redemption of shares of 6½ % Second Cumulative Preferred Stock shall have been duly given, and if on or before the redemption date the funds necessary for such redemption shall have been set aside by the corporation, separate and apart from its other funds, in trust for the pro rata benefit of the holders of shares so called for redemption, then, notwithstanding that any certificate for shares of 6½ % Second Cumulative Preferred Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby shall not be deemed outstanding, dividends thereon shall cease to accrue from and after the redemption date, and all rights with respect to such 6½ % Second Cumulative Preferred Stock so called for redemption shall forthwith after such redemption date cease and determine, except only the right to receive the redemption price therefor, but without interest; and if on or before the redemption date the corporation shall deposit in trust with any bank or trust company in the United States having a capital and undivided surplus of at least three million dollars (\$3,000,000) to be applied to the redemption of the shares of 6½ % Second Cumulative Preferred Stock so called for redemption, funds sufficient for such redemption, and shall have given notice of redemption

Thirty-five Cents (\$7.35) on their shares and in the event of involuntary liquidation or dissolution or winding up to the par amount of their shares, in each case with the amount of unpaid dividends accrued thereon, before any amount shall be paid to the holders of the Common Stock; and after such payments to the holders of Preferred Stock and 6½ % Second Cumulative Preferred Stock the remaining assets and funds shall be divided and paid to the holders of the Common Stock according to their respective shares.

Except as provided below, the corporation may redeem at its option the whole or any part (pro rata or by lot) of the 6½ % Second Cumulative Preferred Stock outstanding at any time by paying therefor in cash Seven Dollars and Thirty-five Cents (\$7.35) per share plus accrued unpaid dividends thereon to the date fixed for such redemption (herein called the "redemption price"), by mailing notice of such redemption to the holders of record of such 6½ % Second Cumulative Preferred Stock so to be redeemed at their respective addresses as the same may appear on the books of the corporation as of a date, not more than fifty days prior to the redemption date, as shall be established by the Board of Directors of the corporation. Such notice shall specify the time and place of redemption and shall be mailed at least thirty days prior to the date specified therein for redemption. So long as any shares of Preferred Stock are outstanding the corporation will not redeem any shares of 6½ % Second Cumulative Preferred Stock unless all dividends upon the Preferred Stock and the full dividends for the then current quarterly dividend period thereon shall have been paid or declared and a sum sufficient for the payment thereof set apart. Unless all dividends upon 6½ % Second Cumulative Preferred Stock shall have been paid and the full dividends thereon for the then current quarterly dividend period shall have been paid or declared and a sum sufficient for the payment thereof set apart, the corporation shall not redeem less than all outstanding shares of 6½ % Second Cumulative Preferred Stock.

If the aforesaid notice of redemption of shares of 6½ % Second Cumulative Preferred Stock shall have been duly given, and if on or before the redemption date the funds necessary for such redemption shall have been set aside by the corporation, separate and apart from its other funds, in trust for the pro rata benefit of the holders of shares so called for redemption, then, notwithstanding that any certificate for shares of 6½ % Second Cumulative Preferred Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby shall not be deemed outstanding, dividends thereon shall cease to accrue from and after the redemption date, and all rights with respect to such 6½ % Second Cumulative Preferred Stock so called for redemption shall forthwith after such redemption date cease and determine, except only the right to receive the redemption price therefor, but without interest; and if on or before the redemption date the corporation shall deposit in trust with any bank or trust company in the United States having a capital and undivided surplus of at least three million dollars (\$3,000,000) to be applied to the redemption of the shares of 6½ % Second Cumulative Preferred Stock so called for redemption, funds sufficient for such redemption, and shall have given notice of redemption as aforesaid or shall have given the bank or trust company irrevocable authority to give such notice, then from and after the date of such deposit all rights of holders of the 6½ % Second Cumulative Preferred Stock so called for redemption shall cease, except the right

to receive the redemption price therefor, but without interest. Any interest accrued on such funds shall be paid to the corporation. Any funds so set aside or deposited and unclaimed at the end of six years from such redemption date shall be released and repaid to the corporation, and such holders of such 6½ % Second Cumulative Preferred Stock so called for redemption as shall not have received the redemption price prior to such release and repayment to the corporation shall look only to the corporation for payment thereof without interest.

No dividend upon the Common Stock in excess of six per centum per annum shall be declared or paid, if thereby the assets of the corporation applicable to the payment of dividends, as determined by the Board of Directors, shall be reduced to an amount less than Two Million Dollars (\$2,000,000).

There are hereby reserved for issuance and sale under any stock option plan, as adopted and as amended by the stockholders by a majority of the votes cast at any properly constituted meeting of stockholders, 250,000 shares of Common Stock of the corporation, par value Twelve Dollars and Fifty Cents (\$12.50) each (except that in the event of any change in the number of outstanding shares of Common Stock of the corporation by reason of split-ups or combinations of shares, or recapitalizations, or by reason of stock dividends, the number of shares so reserved may be adjusted so as to reflect such change); and no stockholder shall be entitled as a matter of right to subscribe for, purchase or receive any shares of Common Stock so reserved or have any preemptive or preferential right to subscribe for or purchase the same."

(c) The first paragraph of Article 4 is amended to read as follows:

"The general officers of this corporation shall be a Chairman of the Board, a President, one or more Vice-Presidents, a Secretary and a Treasurer. The number of directors shall be fixed by the By-laws, but such number shall not be more than fifteen until the date of the annual meeting of the stockholders of the corporation scheduled to be held in the corporation's fiscal year ending October 31, 1957."

(d) The second paragraph of Article 7 is amended to read as follows:

"At every meeting of stockholders each holder of Preferred Stock shall be entitled to eight votes in person or by proxy, and each holder of Common Stock shall be entitled to one vote in person or by proxy, for each share of the capital stock standing in the name of such stockholder on the books of the Company, except where a date shall have been fixed as a record date for the determination of stockholders entitled to vote as hereinafter provided. The By-laws may fix or authorize the Board of Directors to fix in advance a date not exceeding thirty (30) days preceding the date of any meeting of stockholders, or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any change, conversion or exchange of capital stock shall go into effect, as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting, or entitled to receive payment of any such dividend, or entitled to any such allotment of rights, or to exercise the rights in respect of any such change, conversion or exchange of capital stock; and in such case only such stockholders as shall be stockholders of record at the close of business on the date so fixed shall be entitled to such notice of and to vote at such meeting, or to receive such allotment of rights,

release and repayment to the corporation shall look only to the corporation for payment thereof without interest.

No dividend upon the Common Stock in excess of six per centum per annum shall be declared or paid, if thereby the assets of the corporation applicable to the payment of dividends, as determined by the Board of Directors, shall be reduced to an amount less than Two Million Dollars (\$2,000,000).

There are hereby reserved for issuance and sale under any stock option plan, as adopted and as amended by the stockholders by a majority of the votes cast at any properly constituted meeting of stockholders, 250,000 shares of Common Stock of the corporation, par value Twelve Dollars and Fifty Cents (\$12.50) each (except that in the event of any change in the number of outstanding shares of Common Stock of the corporation by reason of split-ups or combinations of shares, or recapitalizations, or by reason of stock dividends, the number of shares so reserved may be adjusted so as to reflect such change); and no stockholder shall be entitled as a matter of right to subscribe for, purchase or receive any shares of Common Stock so reserved or have any preemptive or preferential right to subscribe for or purchase the same."

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Second Cumulative Preferred Stock, voting separately as a class, shall be entitled at the next annual meeting to elect two directors. Such voting power shall so continue to vest in the 6½ % Second Cumulative Preferred Stock until all arrears in payment of quarterly dividends thereon shall have been paid and the dividends thereon for the current quarter shall have been declared and funds for the payment thereof set apart, and upon the happening of such event the 6½ % Second Cumulative Preferred Stock shall be divested of such voting power, but subject always to the same provisions for the vesting of such voting power in the 6½ % Second Cumulative Preferred Stock in the case of any similar future default.

At any annual meeting at which the 6½ % Second Cumulative Preferred Stock shall be entitled to elect directors, the holders of a majority in interest of the then outstanding 6½ % Second Cumulative Preferred Stock, whether present in person or by proxy, shall constitute a quorum for that purpose, and a plurality of the votes of the 6½ % Second Cumulative Preferred Stock at such a meeting at which such a quorum is present shall be sufficient to elect the directors whom the holders of 6½ % Second Cumulative Preferred Stock are entitled to elect. The persons so elected as directors, together with the directors elected by the Preferred and Common Stock, shall constitute the Board of Directors of the corporation.

No amendment, alteration or repeal of the Articles of Association or of the By-laws of the corporation which materially adversely affects the preferences, privileges or voting powers of the Preferred Stock or the 6½ % Second Cumulative Preferred Stock shall be made without the favorable vote of at least two-thirds in interest of the outstanding shares of the class of stock so affected, voting as a class."

Article 4. Directors of the Surviving Corporation. Upon the merger becoming effective, the following persons shall become directors of the Corporation, to serve until the first annual meeting of stockholders of the Corporation to be held after the merger has become effective and until their successors shall be duly elected and qualified:

Messrs. A. O. Choate, William Ewing, L. R. Clausen, H. S. Sturgis, C. M. Robertson, Frederick Nymeyer, John T. Brown, H. G. Barr, Wm. J. Grede, E. P. Hamilton, Wm. B. Peters, Allan B. Kline, Marc B. Rojzman, Edward L. Elliott and Mentor Kraus.

Article 5. Terms and Conditions of the Merger and Consolidation, Conversion of Shares, etc. The terms and conditions of the merger and consolidation, the mode of carrying the same into effect, and the manner and basis of converting the shares of ATC into shares of the Corporation are as follows:

(a) Each of the issued and outstanding shares of Common Stock of ATC shall upon the effectiveness of this merger and consolidation, except as provided below, automatically and without any action on the part of the holder thereof be converted into and be deemed to be (i) one-half of one share of Common Stock of the Corporation and (ii) one share of 6½ % Second Cumulative Preferred Stock, par value \$7 a share, of the Corporation. Each holder of shares of Common Stock of ATC, upon surrender to the Corporation's duly authorized agent of one or more certificates for such shares for cancellation, shall thereafter be entitled to receive certificates representing the number of shares of Common Stock and 6½ % Second Cumulative Preferred Stock of the Corporation to which such holder is entitled as above provided. No fractional shares of Common Stock of the Cor-

Young power in 1972 to Second Cumulative Preferred Stock in the case of any future default.

At any annual meeting at which the 6½ % Second Cumulative Preferred Stock shall be entitled to elect directors, the holders of a majority in interest of the then outstanding 6½ % Second Cumulative Preferred Stock, whether present in person or by proxy, shall constitute a quorum for that purpose, and a plurality of the votes of the 6½ % Second Cumulative Preferred Stock at such a meeting at which such a quorum is present shall be sufficient to elect the directors whom the holders of 6½ % Second Cumulative Preferred Stock are entitled to elect. The persons so elected as directors, together with the directors elected by the Preferred and Common Stock, shall constitute the Board of Directors of the corporation.

No amendment, alteration or repeal of the Articles of Association or of the By-laws of the corporation which materially adversely affects the preferences, privileges or voting powers of the Preferred Stock or the 6½ % Second Cumulative Preferred Stock shall be made without the favorable vote of at least two-thirds in interest of the outstanding shares of the class of stock so affected, voting as a class.

Article 4. Directors of the Surviving Corporation. Upon the merger becoming effective, the following persons shall become directors of the Corporation, to serve until the first annual meeting of stockholders of the Corporation to be held after the merger has become effective and until their successors shall be duly elected and qualified: •

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Article 5. Terms and Conditions of the Merger and Consolidation, Conversion of Shares, etc. The terms and conditions of the merger and consolidation, the mode of carrying the same into effect, and the manner and basis of converting the shares of ATC into shares of the Corporation are as follows:

(a) Each of the issued and outstanding shares of Common Stock of ATC shall upon the effectiveness of this merger and consolidation, except as provided below, automatically and without any action on the part of the holder thereof be converted into and be deemed to be (i) one-half of one share of Common Stock of the Corporation and (ii) one share of 6½ % Second Cumulative Preferred Stock, par value \$7 a share, of the Corporation. Each holder of shares of Common Stock of ATC, upon surrender to the Corporation's duly authorized agent of one or more certificates for such shares for cancellation, shall thereafter be entitled to receive certificates representing the number of shares of Common Stock and 6½ % Second Cumulative Preferred Stock of the Corporation to which such holder is entitled as above provided. No fractional shares of Common Stock of the Corporation shall be issued pursuant to this paragraph (a). In lieu of such a fractional share the Corporation shall at its election deliver to any registered holder of a number of shares of Common Stock of ATC which is not evenly divisible by two (i) \$7.00 in cash or

(ii) non-voting and non-dividend bearing scrip certificates (exchangeable within such period as may be fixed by the Board of Directors of the Corporation, upon surrender thereof with other scrip certificates aggregating one or more full shares, for stock certificates for the full number of shares of Common Stock of the Corporation represented) for such fraction, in such form and containing such terms and conditions as the Board of Directors may approve.

(b) Unless and until any outstanding certificates of Common Stock of ATC shall be surrendered for exchange, no dividend payable to holders of record of Common Stock or 6½% Second Cumulative Preferred Stock of the Corporation shall be paid to the holders of such outstanding certificates on account thereof, but upon surrender of such certificates of Common Stock of ATC there shall be paid to the record holder of the certificates for the Common Stock and 6½% Second Cumulative Preferred Stock of the Corporation, into which such shares shall have been changed, all dividends which have become payable thereon.

(c) Each of the outstanding Warrants to purchase Common Stock of ATC shall upon the effectiveness of the merger and consolidation, except as provided below, automatically and without any action on the part of the holder thereof be converted into and be deemed to be a Warrant entitling the holder to purchase (i) in lieu of each full share of Common Stock of ATC, the following for a price of \$16: (A) one-half of one share of Common Stock of the Corporation, and (B) one share of 6½% Second Cumulative Preferred Stock of the Corporation; and (ii) in lieu of any fraction of a share of Common Stock of ATC, a corresponding fraction of the above combination of Common Stock and 6½% Second Cumulative Preferred Stock at a corresponding fraction of the price of \$16. Warrants may be combined to permit the purchase of full shares. No fractional shares of Common Stock or 6½% Second Cumulative Preferred Stock of the Corporation shall be issued on the exercise of such Warrants. In the event that any person exercising such Warrants would otherwise become entitled to a fractional share of such Common Stock or such 6½% Second Cumulative Preferred Stock, the Corporation may, at its election, in lieu thereof (i) pay an amount in cash equal to such fraction multiplied by the market value of such Common Stock or 6½% Second Cumulative Preferred Stock, as the case may be, at the close of business on the day of surrender of the Warrant, or (ii) issue non-voting and non-dividend bearing scrip certificates (similar to those provided in paragraph (a) above) for such fraction of Common Stock or 6½% Second Cumulative Preferred Stock. Upon the effectiveness of the merger and consolidation all Warrants held by the Corporation shall be terminated.

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Article 6. Stockholder Votes. (a) Of the _____ shares of Common Stock and the _____ shares of 7% Cumulative Preferred Stock of the Corporation outstanding and entitled to vote on the merger and consolidation, _____ shares of Common Stock and _____ shares of 7% Cumulative Preferred Stock were voted for and _____ shares of Common Stock and _____ shares of 7% Cumulative Preferred Stock were voted against the merger and consolidation.

(b) Of the _____ shares of capital stock of ATC outstanding and entitled to vote on the merger and consolidation, _____ shares were voted for and _____ shares were

surrendered for exchange, no dividend payable to holders of record of Common Stock or 6½ % Second Cumulative Preferred Stock of the Corporation shall be paid to the holders of such outstanding certificates on account thereof, but upon surrender of such certificates of Common Stock of ATC there shall be paid to the record holder of the certificates for the Common Stock and 6½ % Second Cumulative Preferred Stock of the Corporation, into which such shares shall have been changed, all dividends which have become payable thereon.

(c) Each of the outstanding Warrants to purchase Common Stock of ATC shall upon the effectiveness of the merger and consolidation, except as provided below, automatically and without any action on the part of the holder thereof be converted into and be deemed to be a Warrant entitling the holder to purchase (i) in lieu of each full share of Common Stock of ATC, the following for a price of \$16: (A) one-half of one share of Common Stock of the Corporation, and (B) one share of 6½ % Second Cumulative Preferred Stock of the Corporation; and (ii) in lieu of any fraction of a share of Common Stock of ATC, a corresponding fraction of the above combination of Common Stock and 6½ % Second Cumulative Preferred Stock at a corresponding fraction of the price of \$16. Warrants may be combined to permit the purchase of full shares. No fractional shares of Common Stock or 6½ % Second Cumulative Preferred Stock of the Corporation shall be issued on the exercise of such Warrants. In the event that any person exercising such Warrants would otherwise become entitled to a fractional share of such Common Stock or such 6½ % Second Cumulative Preferred Stock, the Corporation may, at its election, in lieu thereof (i) pay an amount in cash equal to such fraction multiplied by the market value of such Common Stock or 6½ % Second Cumulative Preferred Stock, as the case may be, at the close of business on the day of surrender of the Warrant, or (ii) issue non-voting and non-dividend bearing scrip certificates (similar to those provided in paragraph (a) above) for such fraction of Common Stock or 6½ % Second Cumulative Preferred Stock. Upon the effectiveness of the merger and consolidation all Warrants held by the Corporation shall be terminated.

Article 6. Stockholder Votes. (a) Of the _____ shares of Common Stock and the _____ shares of 7% Cumulative Preferred Stock of the Corporation outstanding and entitled to vote on the merger and consolidation, _____ shares of Common Stock and _____ shares of 7% Cumulative Preferred Stock were voted for and _____ shares of Common Stock and _____ shares of 7% Cumulative Preferred Stock were voted against the merger and consolidation.

(b) Of the _____ shares of capital stock of ATC outstanding and entitled to vote on the merger and consolidation, _____ shares were voted for and _____ shares were voted against the merger and consolidation.

Article 7. Abandonment of Merger. (a) The merger and consolidation herein provided for may be terminated and abandoned by the Board of Directors of the Corporation at any time before or within five days after both meetings of stockholders have been held if, in the opinion

of such Board, the merger is inadvisable or impracticable by reason of the fact that, in the opinion of such Board, written objections to the merger have been filed (in accordance with the provisions of Section 180.69 of Wisconsin Statutes 1955 or Section 91 of the Stock Corporation Law of New York, as the case may be) with respect to a substantial number of shares of capital stock of ATC and the Corporation or of any one of them, and such merger and consolidation may also be terminated and abandoned by the Board of Directors of ATC at any time within five days after both meetings of stockholders have been held if due approval of the stockholders of the Corporation is not obtained to a revision of the Corporation's Stock Option Plan increasing the maximum aggregate number of shares of the Corporation's Common Stock with respect to which options can be issued under such Plan to 250,000 and increasing the number of shares of Common Stock with respect to which options can be issued to any one employee of the Corporation to 25,000.

(b) The merger and consolidation herein provided for may be terminated and abandoned at any time before its effective date:

(i) by mutual consent of the Boards of Directors of the Corporation and ATC, or

(ii) by the Board of Directors of ATC unless, prior to the effective date of the merger, the Commissioner of Internal Revenue makes a ruling satisfactory to such Board of Directors that the merger will constitute a tax-free reorganization and that a sale of shares of 6½% Second Cumulative Preferred Stock of Case will be considered to fall within an exception provided in Section 306(b)(4) or Section 306(c)(2) of the Revenue Code of 1954;

(c) The Corporation and ATC may mutually agree at any time to waive their respective rights to abandon the merger under this Article 7.

Article 8. Miscellaneous. (a) The Corporation may be sued in New York State for any obligation of ATC, a New York corporation, and it irrevocably appoints the Secretary of State of the State of New York as its agent to accept service of process in any action for the enforcement of payment of obligations.

(b) For all purposes of the laws of the State of Wisconsin, the merger and consolidation herein provided for shall become effective on the due recording of these articles in the office of the Register of Deeds of Racine County in the State of Wisconsin.

For all purposes of the laws of the State of New York the merger and consolidation herein provided for shall become effective when this certificate and the accompanying affidavit shall have been duly filed in the office of the Department of State of the State of New York.

IN WITNESS WHEREOF we have subscribed and acknowledged these Articles and this Certificate and the same have been signed in the name and on behalf of each corporation party hereto the day of 1956.

President of J. I. Case Company

[SEAL]

[fol. 80]

as required under the laws of the State of New York, and such merger and consolidation may also be terminated and abandoned by the Board of Directors of ATC at any time within five days after both meetings of stockholders have been held if due approval of the stockholders of the Corporation is not obtained to a revision of the Corporation's Stock Option Plan increasing the maximum aggregate number of shares of the Corporation's Common Stock with respect to which options can be issued under such Plan to 250,000 and increasing the number of shares of Common Stock with respect to which options can be issued to any one employee of the Corporation to 25,000.

(b) The merger and consolidation herein provided for may be terminated and abandoned at any time before its effective date:

- (i) by mutual consent of the Boards of Directors of the Corporation and ATC, or
- (ii) by the Board of Directors of ATC unless, prior to the effective date of the merger, the Commissioner of Internal Revenue makes a ruling satisfactory to such Board of Directors that the merger will constitute a tax-free reorganization and that a sale of shares of 6½% Second Cumulative Preferred Stock of Case will be considered to fall within an exception provided in Section 306(b)(4) or Section 306(c)(2) of the Revenue Code of 1954;

(c) The Corporation and ATC may mutually agree at any time to waive their respective rights to abandon the merger under this Article 7.

Article 8. Miscellaneous. (a) The Corporation may be sued in New York State for any obligation of ATC, a New York corporation, and it irrevocably appoints the Secretary of State of the State of New York as its agent to accept service of process in any action for the enforcement of payment of obligations.

(b) For all purposes of the laws of the State of Wisconsin, the merger and consolidation herein provided for shall become effective on the due recording of these articles in the office of the Register of Deeds of Racine County in the State of Wisconsin.

For all purposes of the laws of the State of New York the merger and consolidation herein provided for shall become effective when this certificate and the accompanying affidavit shall have been duly filed in the office of the Department of State of the State of New York.

IN WITNESS WHEREOF we have subscribed and acknowledged these Articles and this Certificate and the same have been signed in the name and on behalf of each corporation party hereto the day of 1956.

[SEAL]

President of J. I. Case Company

Secretary of J. I. Case Company

[SEAL]

President of American Tractor Corporation

Secretary of American Tractor Corporation

[fol. 81]

EXHIBIT B TO COMPLAINT**Proxy: J. I. Case Company Special Meeting
of Stockholders**

The undersigned hereby appoints A. O. CHOATE, WILLIAM EWING, L. R. CLAUSEN, H. S. STURGIS, C. M. ROBERTSON, FREDERICK NYMEYER, JOHN T. BROWN, H. G. BARR, WM. J. GREDE, E. P. HAMILTON, WM. B. PETERS and ALLAN B. KLINE, and each of them, attorneys and proxies, each with power of substitution and revocation, for and in the name of the undersigned, to vote all shares of the capital stock of the undersigned in J. I. Case Company (hereinafter called the "Corporation") at a Special Meeting of the Stockholders of the Corporation, to be held at the principal executive office of the Company, Racine, Wisconsin, on November 15, 1956 at 12:00 noon, C. S. T., and at any and all adjournments thereof:

(1) For ☐ Against ☐ the adoption of the Plan of Merger of American Tractor Corporation into this Corporation.

(2) For ☐ Against ☐ the revision of the Stock Option Plan of the Corporation to increase the aggregate number of shares of Common Stock available under the plan from 100,000 to 250,000 shares and to increase the maximum number of shares available thereunder to any one person from 10,000 to 25,000.

(3) In the discretion of such attorneys and proxies, with respect to any other matters which may properly come before the meeting.

If no instruction is indicated, this proxy will be voted for the adoption of the proposals set forth above.

The undersigned hereby revokes all proxies heretofore given to vote at the aforesaid meeting.

.....
Stockholder to Sign Here

, 1956

ated

When signing as attorney, executor, administrator, trustee, guardian, or an officer of a corporation, give title as such. If shares are held jointly, each joint stockholder should sign.

This proxy is being solicited by the Management.

[fol. 82]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
Civil Action File No. 56-C-247

[Title omitted]

SUMMONS AND RETURN

To the above named Defendants:

You are hereby summoned and required to serve upon Bruno V. Bitker plaintiff's attorney, whose address is 208 East Wisconsin Ave. Milwaukee, Wis. an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint:

Dale E. Ihlenfeldt, Clerk of Court.
S. McCaigue, Deputy Clerk.

Date: November 13, 1956

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 82a]

Return on Service of Writ:

I hereby certify and return, that on the 13th day of November 1956, I received this summons and served it together with the complaint herein as follows: on the within named J. I. Case Company by delivering to and leaving

with John T. Brown—President personally a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin. I further certify and return that I served the within Summons together with Complaint on the within named John T. Brown by delivering to and leaving with him personally a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin. I further certify and return that I served the within Summons together with Complaint on the within named H. G. Barr by delivering to and leaving with him personally a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin. I further certify and return that I served the within Summons together with Complaint on the within named L. R. Clausen by delivering to and leaving a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin. I further certify and return that I served the within Summons together with Complaint on the within named William J. Grede by delivering to and leaving with him personally a true copy thereof this 14th day of November, A. D. 1956 at Milwaukee, Wisconsin. I further certify and return that I served the within Summons together with Complaint on the within named William B. Peters by delivering to and leaving with him personally a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin.

Lyle F. Milligan, United States Marshal.

Marshal's Fees

Travel	\$ 5.60
Service	12.00
	<hr/>
	\$17.60

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

[fol. 83]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 56-C-247

[Title omitted]

ORDER TO SHOW CAUSE AND RETURN—November 13, 1956

Upon the verified complaint of the plaintiff, and upon application of Bruno V. Bitker, one of the attorneys for the plaintiff,

It Is Ordered: That defendant, J. I. Case Co., show cause before the above entitled Court, in the Court Room, in the Federal Building, City of Milwaukee, Wisconsin, on the 14th day of November, 1956, at 4:00 o'clock P. M. of said day, or as soon thereafter as counsel may be heard, as to why the Court should not grant a temporary restraining order or temporary injunction, restraining the defendant, its officers, agents and employees, and all persons acting under its authority or control, and each of them, pending the final hearing of this cause, from taking any steps to advance the plan of merger described in the complaint.

It Is Further Ordered: That a copy of this order to show cause and of the verified complaint above referred to, be served upon the defendant, J. I. Case Company, at least four (4) hours prior to the time set for hearing herein.

Dated, Milwaukee, Wisconsin, this 13th day of November, 1956, at the hour of 4:00 o'clock P. M.

Robert E. Tekan, U. S. District Judge.

[fol. 83a]

Eastern District of Wisconsin, ss.:

I hereby certify and return that I served a copy of the within Order to Show Cause on the within named J. I. Case Company by delivering to and leaving with John T. Brown—President personally a true copy thereof this 14th day of

November, A. D. 1956 at Racine, Wisconsin. I further certify and return that I served a copy of the within Order to Show Cause on the within named John T. Brown—by delivering to and leaving with him—personally a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin. I further certify and return that I served the within Order to Show Cause—on the within named H. G. Barr by delivering to and leaving with him personally a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin. I further certify and return that I served the within Order to Show Cause on the within named L. R. Clausen by delivering to and leaving with him a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin. I further certify and return that I served the within Order to Show Cause on the within named William B. Peters by delivering to and leaving with him personally a true copy thereof this 14th day of November, A. D. 1956 at Racine, Wisconsin.

Lyle F. Milligan, U. S. Marshal.

[fol. 86]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Civil Action File No. 56-C-247

[Title omitted]

AFFIDAVIT OF H. D. MURPHY—Filed November 14, 1956

State of Wisconsin,
Milwaukee County, ss.:

H. D. Murphy, being first duly sworn on oath, deposes and says:

That he is a partner of Price Waterhouse & Co., Certified Public Accountants; that the public accounting work in connection with the merger of J. I. Case Company and American Tractor Corporation was done under his supervision.

That on page 40 of Exhibit A to the Complaint, Note 1, Paragraph (b) of "Notes to Transactions Given Effect to in Pro Forma Balance Sheet" states:

"The Board of Directors of Case has determined that the minimum fair value of the net assets of ATC to be acquired in the merger is \$14,757,068."

This amount was considered by the Board of Directors of Case to be the net assets after deducting the redemption value of the preferred stock outstanding—namely, \$1,312,500—as of the date of the pro forma balance sheet. Subsequent [fol. 87] redemption of this preferred stock is, therefore, automatically provided for without changing the values of assets to be acquired;

That this affidavit is made in opposition to the Order to Show Cause for a temporary restraining order or temporary injunction, and is made in explanation of certain allegations of the complaint in this proceeding asserted on information and belief.

H. D. Murphy.

Subscribed and sworn to before me this 14th day of November, A. D. 1956.

Alice Fleissner, Notary Public, Milwaukee County, Wisconsin. My commission expires: March 22nd, A. D. 1959.

[fol. 88]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Civil Action File No. 56-C-247

[Title omitted]

AFFIDAVIT OF CLARK M. ROBERTSON—

Filed November 14, 1956

State of Wisconsin,
Milwaukee County, ss.:

Clark M. Robertson, being first duly sworn on oath, deposes and says:

That he is General Counsel, and one of the attorneys for J. I. Case Company, the defendant in the above entitled proceeding, and makes this affidavit in opposition to the Order to Show Cause served on said defendant, J. I. Case Company, this morning, November 14, 1956, at approximately the hour of 8:30 a.m. o'clock, and for the purpose of informing the Court with respect to certain aspects of the proceeding;

That yesterday afternoon, November 13, 1956, this affiant received a telephone call from one of the plaintiff's attorneys, Mr. Bruno V. Bitker, who courteously informed affiant that he had been retained to institute an action to prevent the merger of the defendant and American Tractor Corporation; that he did not have the papers at that time, but he expected them in during the course of the afternoon;

[fol. 89] The next word affiant had of this proceeding was a telephone call from Racine at about 8:30 o'clock this morning from Mr. John T. Brown, the President of the defendant, informing him that he had just been served with a Complaint and Order to Show Cause;

At about 9:50 o'clock this morning, affiant received a telephone call from Mr. William J. Grede, advising him that he had just been served with a copy of the Complaint. Mr.

Grede sent the Complaint to affiant by messenger at about 10:15 o'clock, and shortly thereafter the papers served on the defendant, J. I. Case Company, arrived from Racine;

That the matters involved in said Complaint were within the knowledge of the plaintiff and his attorney, Mr. Arnold I. Shure, for a substantial period of time prior to November 14, 1956;

That under date of September 12, 1956, Mr. Arnold I. Shure wrote to Mr. John T. Brown, President of J. I. Case Company, requesting information with respect to the proposed merger, to which letter Mr. Brown replied;

Subsequent thereto, Mr. Shure communicated by telephone with this affiant raising certain questions with respect to the Plan of Merger and requesting additional information with respect to American Tractor Corporation; that pursuant thereto on September 17, 1956, Mr. John T. Brown mailed the 1955 Annual Report of American Tractor Corporation to Mr. Shure, together with a nine months' statement of that company ending May 31, 1956, and a pamphlet which included descriptions of some of the equipment manufactured and sold by American Tractor Corporation;

On September 18, 1956, Mr. Shure wrote Mr. Brown acknowledging receipt of the papers referred to above, making further objection to the merger, and stating that if additional information was not forthcoming he and his [fol. 90] client, Mr. Borak, would have no alternative but to actively oppose the Plan;

Thereafter, on Monday, October 8, 1956, the plaintiff, Carl H. Borak, and Mr. Shure, his attorney, conferred at Racine with Mr. John T. Brown, and the defendant, Mr. William J. Grede. During the course of that meeting formal written demand was made by the plaintiff for a list of shareholders of J. I. Case Company for the purpose of communicating with shareholders in opposition to the proposed merger; thereafter affiant and Mr. Shure conversed over the telephone a number of times with respect to the mechanics of furnishing the list of shareholders;

Affiant also made arrangements for Mr. Borak and Mr. Shure to visit the plant of American Tractor Corporation at Churbusco, Indiana on October 10th, 1956, and after this meeting affiant was sent a copy of a letter addressed to the plaintiff and signed by the President of American Tractor Corporation referring to the fact that plaintiff and Mr. Shure were satisfied with their visit at the plant, and that this affiant need not proceed further with respect to furnishing the shareholders' list previously requested;

That the proxy material attached to the Complaint was duly filed with the Securities and Exchange Commission in the manner required by law; that said proxy material was mailed to the stockholders of record October 16, 1956 on or about October 18, 1956; that Mr. Shure requested of Mr. John T. Brown that he be furnished with a copy of the proxy material by special mailing to his home, and Mr. Brown mailed the proxy material to Mr. Shure from Racine addressed to Mr. Shure's home on October 19, 1956;

That on or about October 23, 1956 Mr. Shure expressed to this affiant his displeasure with the merger, giving as his reason therefor that he had not been informed that the [fol. 91] defendant, J. I. Case Company, was acquiring the Preferred Stock and Purchase Warrants of American Tractor Corporation referred to in the Complaint; at this time Mr. Shure renewed his demand for a list of the shareholders of J. I. Case Company, and by special arrangement with J. P. Morgan & Co., the Transfer Agent of J. I. Case Company, a certified list of the shareholders as of October 16, 1956 was prepared and delivered to Mr. Shure at his office on October 31, 1956;

That subsequent thereto, on or about the 5th or 6th of November, 1956, by telephone conversation Mr. Shure requested affiant to advise him the value which the Board of Directors of J. I. Case Company proposed to assign to the Common Stock of J. I. Case Company, in accordance with Section 180.69 of the Wisconsin Statutes;

That on November 10, 1956 defendant received by registered mail, special delivery, a written objection signed by the plaintiff by which plaintiff seeks to invoke the appraisal provision of Section 180.69 of the Wisconsin Statutes;

That this affidavit is additionally made for the purpose of showing that the plaintiff had adequate time to institute this proceeding and have a determination thereof well in advance of the stockholders' meeting of November 15, 1956, and no emergency exists with respect to the restraining order.

Clark M. Robertson

Subscribed and sworn to before me this 14th day of November, A.D. 1956

Alice Fleissner, Notary Public, Milwaukee County, Wisconsin. My commission expires: March 22nd, A.D. 1959.

[fol. 92]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ANSWER TO COMPLAINT—Filed November 26, 1956

The defendants, J. I. Case Company; John T. Brown; H. G. Barr; L. R. Clausen; William J. Grede, and William B. Peters, by their attorneys, Robertson and Hoebreckx and H. Maxwell Manzer, of Counsel, answering the complaint of the plaintiff:

I

Defendants state they are without knowledge or information sufficient to form a belief as to the truth of paragraph 2 of the complaint that plaintiff brings the action in a representative capacity, and therefore deny the same.

II

Deny the allegations contained in paragraph 9 of the complaint that the Plan of Merger was approved by the

Board of Directors of Case on or about October 2, 1956, and state that such Plan of Merger was, in fact, approved on September 24, 1956.

[fol. 93]

III

Deny that the capitalization of American Tractor Corporation as of July 31, 1956 is as alleged in paragraph 11 of the complaint.

IV

Deny the allegations contained in paragraph 13 of the complaint that defendant officers caused Case to purchase Fifty Thousand (50,000) shares of American Tractor Corporation Convertible Preferred Stock, Series 56-2, and stock purchase warrants as alleged before formal approval of the Plan of Merger by the Board of Directors.

V

Deny that any material in the Proxy Statement referred to in paragraph 15 of the complaint is untrue or misleading.

VI

Deny the allegations contained in paragraph 16 of the complaint that a direct and immediate consequence of the proposed merger will be to dilute the present book value of Case Common Stock to the injury of the present shareholders thereof, and specifically deny that there will be a loss of approximately Ten Dollars (\$10.00) per share.

VII

Deny the allegations contained in paragraph 17 of the complaint that the proposed merger is against the best interests of the common stockholders of Case; deny that the same is prejudicial to such stockholders' rights; and deny that the Plan of Merger has been formulated or developed in nonconformity with the obligations imposed on the officers and directors of Case by law.

VIII

Deny the allegations contained in paragraph 17(a) of the complaint that the primary effect of the merger is to give voting control of Case to outsiders not previously associated with management and not shareholders of the Company, and deny that fees and salaries received by defendant [fol. 94] officers are in excess of Three Hundred Thousand Dollars (\$300,000) per year.

IX

Deny the allegations contained in paragraph 17(b) of the complaint that Case sales and earnings from the sale of farm implements have declined considerably more than its competitors.

X

Deny the allegations contained in paragraph 17(c) of the complaint that a substantial part of 1956 sales are "paper sales" to dealers who will not have to pay for the equipment placed with them unless actually sold.

XI

Deny the allegations contained in paragraph 17(d) of the complaint that defendant Case Company arranged the merger transaction with American Tractor Corporation for the purpose of attempting to ward off stockholders and the possibilities of a proxy fight, and state that said allegations are inconsistent with the allegations of paragraph 17(a) of the complaint.

XII

Deny the allegations contained in paragraph 17(e) of the complaint that the Board of Directors of Case violated the provisions of Section 180.14, Wisconsin Statutes, and deny that the consideration fixed for stock to be issued by Case for the assets of American Tractor Corporation was less than the par value of such securities, and further deny that the consideration to be received will be less than par value of such securities.

XIII

Deny the allegations contained in paragraph 17(f) of the complaint that the Board of Directors violated Sections 180.14 and 180.16 of the Wisconsin Statutes in any respect.

[fol. 95]

XIV

Deny the allegations contained in paragraph 17(g) of the complaint that the value placed upon the assets of American Tractor Corporation is grossly excessive and bears no relationship to the true value. Deny that the Proxy Statement misrepresents in any manner or form the products of American Tractor Corporation.

XV

Deny the allegations contained in paragraph 19 of the complaint that the Stock Option Plan referred to therein evidences any failure whatsoever of defendant officers to properly protect the interests of the common stockholders, or is defective in any manner.

XVI

Deny the allegations contained in paragraph 20 of the complaint that defendant officers and directors of J. I. Case Company violated Section 180.15 of the Wisconsin Statutes in any respect.

XVII

Deny the allegations contained in paragraph 21 of the complaint that the Proxy Statement referred to therein failed to properly and fully inform shareholders of important facts relating to the wisdom or soundness of the proposed merger; deny that such Proxy Statement contained any incorrect or misleading statements and accordingly deny that any proxies received by management pursuant to its solicitation are illegal and void.

XVIII

Deny the allegations contained in paragraph 22 of the complaint that certain holders of Case Common Stock, in-

cluding the defendant officers, and persons affiliated with them, will gain in connection with such merger in any manner disproportionate to any other holder of Case Common Stock; deny that plaintiff and other holders of Case Common Stock will be severely and irreparably damaged as [fol. 96] a result of the consummation of such Plan of Merger, and on the contrary assert that the common stockholders will gain thereby as set forth in the Proxy Statement.

XIX

Deny the allegations contained in paragraph 23 of the complaint that plaintiff has no adequate remedy at law.

Wherefore, defendants pray for judgment dismissing the plaintiff's complaint and awarding defendants their costs and disbursements in such action.

Robertson and Hoebreckx, By Clark M. Robertson,
By Walter S. Lewis, Jr., Attorneys for the Defen-
dants, 640 Wells Building, 324 East Wisconsin
Avenue, Milwaukee 2, Wisconsin.

Of Counsel: H. Maxwell Manzer, 119 Monona Avenue,
Madison 3, Wisconsin.

[fol. 97]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ORDER TO SHOW CAUSE—November 26, 1956

Upon the attached affidavit of John T. Brown, one of the defendants and the President of the defendant, J. I. Case Company, and upon the application of Robertson and Hoebreckx, attorneys for the defendants;

It Is Ordered, that the plaintiff, Carl H. Borak, show cause before the above entitled Court in the Federal Build-

ing, City of Milwaukee, Wisconsin, on the 10th day of December, 1956, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, why this Court should not enter an order waiving pre-trial procedure and advancing this cause on the calendar for immediate trial.

It Is Further Ordered, that a copy of this Order to Show Cause and the accompanying affidavit be served upon the plaintiff's attorneys at least 48 hours prior to the time set for hearing herein.

Dated at Milwaukee, Wisconsin, this 26th day of November, 1956, at the hour of 5 o'clock in the afternoon.

Robert E. Tehan, U. S. District Judge.

[fol. 98]

[Title omitted]

AFFIDAVIT OF JOHN T. BROWN IN SUPPORT OF MOTION

State of Wisconsin,
County of Racine, ss.:

John T. Brown, being first duly sworn, on oath deposes and says as follows:

(1) That he is one of the defendants in the above entitled action and the president and chairman of the Board of Directors of the defendant corporation, J. I. Case Company.

(2) That the business aim and purpose of the proposed merger of American Tractor into the defendant corporation is to diversify the products of J. I. Case Company and provide it with an extensive line of light and medium sized crawler tractors and earth moving equipment to complement its already existing full line of agricultural tractors and implements, all as set forth in detail in his letter to stockholders, set forth in Exhibit A to the Complaint.

[fol. 99] (3) That said merger contemplates the complete integration of production facilities and the utilization of presently idle facilities of J. I. Case Company, as well as

the integration of two presently existing sales distribution systems.

(4) That in order to utilize presently idle manufacturing facilities for the production of the new, diversified line of products, certain modification and rehabilitation work must be accomplished by the defendant corporation.

(5) That in order to integrate the sales distribution systems in time for the 1957 selling season, the defendant corporation must enter into new contracts with dealers in the United States and Canada to handle the new diversified line.

(6) That even with the new diversified line of products, the defendant corporation's sales will be subject to the seasonal peaks and valleys inherent in both the road machinery and farm machinery industries, i.e. production in the winter and early spring months for sale in spring, summer, and fall months, with the spring months generally being peak sales months.

(7) That in order to realize the benefits of the proposed merger of American Tractor Corporation into the defendant, J. I. Case Company, during the selling months of 1957, the integration of manufacturing facilities and distribution systems must be commenced immediately and effectuated as rapidly as possible; that a delay in effectuation of one week at this time may be magnified into a minimum of one month's loss during the selling months.

[fol. 100] (8) That the pendency of this action is causing and threatening to cause substantial and irreparable damage to the defendant corporation, to the ultimate detriment of the employees and shareholders thereof; that sales lost during the spring months of 1957 will be irretrievably lost, as well as future replacement sales; that such losses will be caused by the defendant corporation's inability, by virtue of this action to:

- (a) Exhibit the diversified products of the defendant corporation under its own name at the Road Show in January 1957, which show is one of the most important exhibitions in the industry and is held only once every seven years.

- (b) Make mill commitments for steel to handle its increased production, thereby ultimately causing it to depend on warehouse suppliers at increased costs.
- (c) Release orders in new tools and machinery, thereby ultimately causing it to lose its priority for delivery.
- (d) Commence rehabilitation of idle facilities on schedule, thereby ultimately requiring it to attempt to make up for lost time at increased costs for overtime and for subletting work which it otherwise would have performed itself.
- (e) Immediately launch a unified, pre-sales season advertising and demonstration program.
- (f) Immediately assure its dealers that they will have a diversified line of products to offer their customers during the 1957 sales season.

[fol. 101] (9) That the sales potential for 1957 of the merged corporation, which is in jeopardy, can be estimated conservatively at \$10,000,000, and the loss of profits at \$1,000,000; that even if these sales can be realized, a delay in amalgamation and commencement of the unified programs hereinbefore outlined could increase the costs of production by an estimated \$500,000.

(10) That he makes this affidavit in support of the defendants' application for an order to show cause why pre-trial procedures should not be waived and this action be advanced on the calendar for immediate trial.

John T. Brown

Subscribed and sworn to before me this 26 day of November, 1956.

Vonnie Jones, Notary Public, Racine County, Wisconsin. My commission expires April 10, 1960.

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
Civil Action File No. 56-C-247

CARL H. BORAK, Plaintiff,

v.

J. I. CASE COMPANY, a Wisconsin corporation; JOHN T. BROWN; H. G. BARR; L. R. CLAUSEN; WILLIAM J. GREDE; and WILLIAM B. PETERS, Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING
MOTION FOR TEMPORARY INJUNCTION—November 29, 1956

The defendant, J. I. Case Company, appeared before this Court at four o'clock in the afternoon of the 14th day of November 1956, to show cause why a temporary injunction should not be granted restraining said Company, its officers and agents, from taking any steps to advance the Plan of Merger between it and the American Tractor Corporation:

Mr. Alex Elson of Chicago, Illinois and Mr. Bruno V. Bitker of Milwaukee, Wisconsin, Attorneys, appeared on behalf of the plaintiff, the applicant for such temporary injunction;

and

Robertson and Hoebreckx, by Messrs. Clark M. Robertson and Walter S. Davis, Jr., of Milwaukee, Wisconsin, and Mr. H. Maxwell Manzer, of Madison, Wisconsin, Attorneys, appeared on behalf of defendant, J. I. Case Company.

Upon stipulation of counsel the Court heard such matter sitting in banc and, after hearing and considering the cause, [fol. 110] on November 15th, 1956 made and filed its Memorandum Decision herein, which is made a part of the Court's Findings of Fact and Conclusions of Law. Consistent

therewith, and upon the record, admissions of counsel, and evidence adduced, the Court being fully advised in the matter, for the purpose of this application makes the following:

Findings of Fact

1.

Defendant, J. I. Case Company, a Wisconsin corporation, is a full line producer of farm machinery, including tractors and all of the equipment generally used in plowing, tilling, fertilizing, planting and seeding, cultivating, making hay, and silage and harvesting grains, seeds, corn and many other crops. In addition, it produces and sells for non-farm use wheel tractors and power engine units. Its capitalization includes 92,906 issued and outstanding shares of Preferred Stock and 2,262,766 issued and outstanding shares of Common Stock.

2.

American Tractor Corporation, a New York corporation, manufactures crawler tractors, bulldozers, angledozers, and other industrial and specialized equipment.

3.

On or about September 6, 1956, the Board of Directors of Case and American Tractor Corporation approved plans for the merger of the two companies, and on October 15, 1956, after prior submission to the Securities and Exchange Commission, the Case Company mailed to its shareholders a printed brochure describing the proposed merger, and including therein: a letter from the President and Chairman of the Board and Notice of Special Meeting of Stockholders [fol. 111] to be held November 15, 1956, to consider and take action upon the Plan of Merger; a Proxy Statement describing the Plan; the Plan of Merger; and Articles of Merger and Certificate of Consolidation.

4.

The plaintiff, Carl H. Borak, is the owner of Two Thousand (2,000) shares of J. I. Case Company Common Stock.

Since the middle of September 1956, the plaintiff and his attorney have been in frequent communication with defendant, its officers and attorneys, relative to the proposed merger, and said defendant, Case Company, has cooperated fully with said plaintiff in respect to keeping him advised as to developments incident to such merger, including furnishing plaintiff's attorney with a special mailing of the Proxy material and a certified list of Case stockholders, and the matters involved herein were within the knowledge of plaintiff and his attorney for a substantial period of time prior to November 14, 1956.

5.

Process was first served on defendant herein at Racine, Wisconsin on the morning of November 14, 1956, some six hours before defendant was required to appear before this Court in Milwaukee, Wisconsin, and only one day prior to the time set for the stockholders' meeting to consider such merger.

6.

A substantial portion of the complaint herein is on information and belief, and the evidence does not establish that the proposed merger of defendant, Case Company, and American Tractor Corporation (a) is illegal; (b) is fraudulent; (c) will irreparably damage the plaintiff.

[fol. 112]

7.

The plaintiff and other shareholders of J. I. Case Company who do not approve of the merger with American Tractor Corporation are provided with a method for obtaining the fair value of their shares, which method is described in the Proxy Statement sent to them, and is in accordance with Section 180.69 of the Wisconsin Statutes.

And the Court makes the following:

Conclusions of Law

1.

The plaintiff, in not making this application more timely, has failed to do equity.

2.

The injury to plaintiff from a denial of this application for a temporary injunction will be relatively insignificant as compared with that which defendant, J. I. Case Company, would suffer from the granting of same.

3.

On the basis of the showing thus far made, the plaintiff has an adequate remedy at law against the defendant.

4.

The plaintiff is not entitled to a temporary injunction restraining the defendant, its officers and agents, from taking any steps to advance the Plan of Merger between it and American Tractor Corporation.

5.

The defendant is entitled to an order denying the application for a temporary injunction.

[fol. 113] Now, Therefore, It Is Ordered:

That plaintiff's application for a temporary injunction restraining the defendant, its officers and agents, from taking any steps to advance the Plan of Merger between it and American Tractor Corporation be, and the same hereby is, denied.

Dated this 29th day of November, 1956.

Robert E. Tehan, United States District Judge, Presiding.

[fol. 114]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ANSWER TO ORDER TO SHOW CAUSE—Filed December 17, 1956.

Now Comes Carl H. Borak, Plaintiff, by his attorneys, Bruno V. Bitker, Alex Elson and Arnold I. Shure, and in answer to the Order to Show Cause entered by the Court on November 26, 1956, why this Court should not enter an order waiving pre-trial procedures and advancing this cause on the calendar for immediate trial, states as follows:

1. The Order to Show Cause was entered on the basis of an affidavit of one of the defendants, John T. Brown. Paragraph 1 of the affidavit identifies Mr. Brown as the president and chairman of the Board of Directors of defendant J. I. Case Company. Paragraphs 2 to 7 of the affidavit state the avowed principal purpose of the proposed merger is diversification, the need to engage in modification and rehabilitation work in order to utilize present idle manufacturing facilities, the need to enter into new contracts with dealers in order to integrate the sales distribution system to handle the new diversified line, and the need to integrate immediately the manufacturing facilities and distribution systems of American Tractor Company and J. I. Case Company. Paragraph 8 sets forth various elements of claimed loss or damage to defendant J. I. Case [fol. 115] Company by reason of the pendency of the action.

2. The basic assumption of the affidavit is that the pendency of the action prevents the defendant J. I. Case Company from consummating the merger. The fact is that plaintiff's motion for a preliminary injunction was denied by the Court by order entered November 29, 1956. There is no order of this Court in this action which in any way prevents defendant J. I. Case Company from consummating the merger and taking the steps which the affidavit of

John T. Brown states are necessary. If the affidavit is to be taken literally it represents a restriction placed by the defendants upon themselves voluntarily and without compulsion of this Court.


3. The affidavit of John T. Brown, insofar as it asserts elements of possible damage which may follow from the pendency of this case is speculative and conjectural. But in any event if any damage should result from the delay in effecting the merger the damage is self-inflicted since there is no legal impediment to proceeding with the proposed merger.

4. The affidavit of defendant John T. Brown is in certain respects inconsistent and in conflict with the letter sent by defendant Brown, as Chairman of the Board and President of J. I. Case Company to stockholders, under date of November 30, 1956, a copy of which is hereto attached and made a part hereof, as Exhibit 1, in the following particulars:

(a) Contrary to the affidavit it would appear from the letter that the defendant J. I. Case Company does intend to proceed with the proposed merger. Thus the letter recites that the plan received stockholder approval, that the Board of Directors decided that numbers of stockholders filing [fol. 116] objections entitling them to appraisal was not so substantial as to render the merger inadvisable or impracticable, and therefore "the Board authorized the proper officers of the Company to take such action as is necessary or desirable to consummate the plan of merger."

(b) Contrary to the averments of Paragraph 8 of the affidavit that the pendency of the action prevents commencing "rehabilitation of idle facilities on schedule", the letter states, "Since the action taken by the directors and the stockholders, we have been proceeding to convert the Burlington, Iowa, plant for the manufacture of certain sizes of crawler tractors and their equipment."

(c) Contrary to the impression sought to be created by the affidavit that the integration of the two companies concerned was somehow being prevented by this action, the



letter states "plans are now being developed for integrating the distributory and selling organizations of the two companies in order that we may realize the benefits from this merger as rapidly as possible."

5. The affidavit of defendant John T. Brown is also inconsistent with the actions of defendant J. I. Case Company. Thus on Monday, December 10, 1956, Case held a press preview at Churubusco, Indiana at the site of American Tractor Corporation, of what is held out as its first full line of construction machinery. The press preview was attended by representatives of trade and farm journals and was reported by a Wall Street Journal staff reporter, in a story which was printed in the Wall Street Journal, Tuesday, December 11, 1956, a copy of which is hereto attached and is made a part hereof, as Exhibit 2. The holding of the press preview makes clear that the pendency of this action does not render the J. I. Case Company unable, as [fol. 117] stated in sub-paragraphs (e) and (f), paragraph 8 of the affidavit of John T. Brown to "immediately launch a unified, pre-sales season advertising and demonstration program", or "immediately assure its dealers that they will have a diversified line of products to offer their customers during the 1957 sales season."

6. Plaintiff desires the earliest trial date convenient to the Court. Delay in the trial of this action will prejudice plaintiff far more than defendant. The Court having denied the plaintiff's motion for preliminary injunction there is no Court order barring the defendants from proceeding to effectuate the proposed merger. Before plaintiff can proceed to trial in this case it is necessary that he engage in extensive pre-trial discovery. Since the action here is a class action plaintiff is under an obligation to take all steps necessary to fairly insure the adequate representation of all shareholders similarly situated to himself. The issues involved in this case are complicated, technical in character and require, for proper presentation, extensive research, investigation and study. It will be necessary to examine numerous books, records and documents. Herewith attached and made a part hereof as Exhibit 3 is a copy of a

letter request dated December 5, 1956, addressed on behalf of plaintiff to defendant's counsel listing some but not all of the books, records and documents which plaintiff must examine prior to proceeding with this case. It is obvious from Exhibit 3 that considerable time will be required for the examination, consideration and study of the documents therein referred to. In addition, it will be necessary for the plaintiff to take the depositions of all of the directors [fol. 118] and officers of J. I. Case Company, some of the key personnel of the company, the principal directors and officers of the American Tractor Corporation, and a substantial number of brokerage firms in New York City and Chicago.

Plaintiff will cooperate in expediting the pre-trial discovery hereinabove referred to.

For the foregoing reasons plaintiff submits that the Court should not enter an order waiving pre-trial procedure in this case and should not advance this cause on the calendar for immediate trial.

Carl H. Borak, Plaintiff, By Alex Elson, One of the Attorneys for Plaintiff.

Bruno V. Bitker, 208 East Wisconsin Avenue, Milwaukee
2, Wisconsin; Alex Elson, 11 South LaSalle Street, Chicago
3, Illinois; Arnold I. Shure, 11 South LaSalle Street, Chicago 3, Illinois; Attorneys for Plaintiff.

[fol. 269]

CERTIFICATE OF CONSOLIDATION**of****AMERICAN TRACTOR CORPORATION****and****J. I. CASE COMPANY****into****J. I. CASE COMPANY****(Pursuant to Section 91 of the Stock Corporation Law
of New York)**

ARTICLES OF MERGER**of****AMERICAN TRACTOR CORPORATION****into****J. I. CASE COMPANY****(Pursuant to Section 180.68 of Wisconsin Statutes 1955)**

J. I. Case Company (hereinafter sometimes called "the Corporation"), a Wisconsin corporation, and American Tractor Corporation (hereinafter sometimes called "ATC"), a New York corporation, desiring to effect the merger of ATC into the Corporation pursuant to the provisions of Section 180.68 of the Wisconsin Statutes 1955 and the consolidation of ATC with the Corporation pursuant to the provisions of Section 91 of the Stock Corporation Law of New York, and the Boards of Directors of each such corporation having adopted a Plan of Merger as set forth and included in these Articles of Merger and Certificate of Consolidation, their respective Presidents or one of their respective Vice Presidents and their respective Secretaries or one of their respective Assistant Secretaries do hereby certify:

Article 1. Corporations Proposing to Merge and Consolidate. The corporations to be included in the merger and consolidation are J. I. Case Company, a Wisconsin corporation, and American Tractor Corporation, a New York corporation. J. I. Case Company, a Wisconsin corporation and one of the constituent corporations, will survive the merger and consolidation. The name of such surviving corporation will continue to be "J. I. Case Company" and its principal office will continue to be at 700 State Street, Racine, Wisconsin.

J. I. Case Company was incorporated under the laws of the State of Wisconsin on February 25, 1880 as J. I. Case Threshing Machine Company, and was authorized to do business in the State of New York by certificate of authority of the Secretary of State of New York dated February 18, 1907.

[fol. 270] The Certificate of Incorporation of American Tractor Corporation, which was incorporated under the Stock Corporation Law of New York as Washington Tractor & Farm Equipment Corp., was filed in the office of the Secretary of State of New York on July 19, 1948.

Article 2. Outstanding Shares of the Corporation and ATC. The Corporation had outstanding as of the date of the meeting of its stockholders to act on this merger and consolidation a total of 2,355,672 shares of capital stock, divided into 2,262,766 shares of Common Stock, par value \$12.50 a share, and 92,906 shares of 7% Cumulative Preferred Stock, par value \$100 a share. As of the date of filing these Articles of Merger and Certificate of Consolidation the Corporation had outstanding a total of 2,355,672 shares of capital stock, divided into 2,262,766 shares of Common Stock and 92,906 shares of 7% Cumulative Preferred Stock.

ATC had outstanding as of the date of the meeting of the stockholders to act on this merger and consolidation a total of 1,223,557 shares of capital stock, divided into 1,111,057 shares of Common Stock, par value 25¢ a share, and 112,500 shares of Convertible Preferred Stock, Series 55-1, 56-1 and 56-2. The 1,111,057 shares of Common Stock were entitled to vote on the merger and consolidation. Prior to the effec-

tive date of this merger and consolidation ATC will have redeemed all its outstanding shares of Convertible Preferred Stock, Series 55-1, 56-1 and 56-2. Accordingly, under the terms of the Certificate of Incorporation, as amended, of ATC such shares were not part of the capital stock of ATC entitled to vote on this merger and consolidation. As of the date of filing these Articles of Merger and Certificate of Consolidation ATC had outstanding a total of 1,111,057 shares of Common Stock.

Article 3. Changes in the Articles of Association of the Corporation. The following changes in the Articles of Association of the Corporation, the surviving corporation, are to be effected by this merger and consolidation:

(a) The provisions of Article 1 following the initial paragraph thereof are amended to read as follows:

"The business and purposes of such corporation are and shall be:

To manufacture, purchase, sell and repair all kinds of agricultural machinery, tools, implements, and farm equipment; all kinds of engines, motors, tractors, road machinery, wagons, motor vehicles, and other vehicles; all devices, attachments and equipment used or intended for use in connection therewith, and to produce, manufacture, buy, sell and deal in any and all materials used in connection with their manufacture, and to engage in any other lawful business for any purpose whatever for which corporations may be organized under Chapter 180, Wisconsin Business Corporation Law.

To apply for, obtain, register, lease or otherwise acquire, and to hold, use, own, operate, sell, license, assign or otherwise dispose of any trademarks, trade names, patents, inventions, improvements, processes and formulae used or usable in connection with the manufacture, production, sale or repair of any articles.

To engage in any and all lawful business whenever necessary, convenient or incidental to the exercise or attainment of any of the powers or purposes herein-

before specified, excepting such as is forbidden by law.

The corporation shall have power to conduct its business in any of the states, territories or colonial possessions of the United States and in foreign countries, and to have one or more offices outside of the state of Wisconsin; and to hold, purchase, mortgage and convey real and personal property both in and out of the state of Wisconsin."

[fol. 271] (b) Article 3 is amended to read as follows:

"The capital stock of this corporation shall consist of an aggregate of Five Million Four Hundred One Thousand Eight Hundred Twenty-Five (5,401,825) shares of capital stock, divided into One Hundred One Thousand Eight Hundred Twenty-Five (101,825) shares of Preferred Stock, par value One Hundred Dollars (\$100) each, One Million Three Hundred Thousand (1,300,000) shares of 6½% Second Cumulative Preferred Stock, par value Seven Dollars (\$7) each, and Four Million (4,000,000) shares of Common Stock, par value Twelve Dollars and Fifty Cents (\$12.50) each.

The holders of the Preferred Stock shall be entitled to receive, when and as declared, from the surplus or net profits of the corporation, yearly dividends at the rate of seven per centum per annum, and no more, payable quarter-yearly on dates to be fixed by the By-laws. The dividends on the Preferred Stock shall be cumulative, and shall be payable before any dividends on the 6½% Second Cumulative Preferred Stock or on the Common Stock shall be paid or set apart, so that, if in any year dividends amounting to seven per centum shall not have been paid on the Preferred Stock, the deficiency shall be payable before any dividend shall be paid upon or set apart for the 6½% Second Cumulative Preferred Stock or for the Common Stock.

The holders of the 6½% Second Cumulative Preferred Stock shall be entitled to receive, when and as declared, from the surplus or net profits of the cor-

poration, yearly dividends at the rate of six and one-half per centum, per annum, and no more, payable quarter-yearly on dates to be fixed by the By-laws. The dividends on the 6½% Second Cumulative Preferred Stock shall be cumulative, and shall be payable before any dividends on the Common Stock shall be paid or set apart, so that, if in any year dividends amounting to six and one-half per centum shall not have been paid thereon, the deficiency shall be payable before any dividend shall be paid upon or set apart for the Common Stock. Cash dividends on the 6½% Second Cumulative Preferred Stock shall accrue from the date of issue, if that be a dividend date, and otherwise from a date five days after the approval of the merger of American Tractor Corporation into the corporation by the stockholders of both such companies. Whenever all cumulative dividends on the Preferred Stock for all previous years shall have been declared and shall have become payable, and the accrued quarter-yearly installments on such stock for the current year shall have been declared, and the corporation shall have paid such cumulative dividends for previous years and such accrued quarter-yearly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the 6½% Second Cumulative Preferred Stock, payable then or thereafter, out of any remaining surplus or net profits.

Whenever all cumulative dividends on the Preferred Stock and the 6½% Second Cumulative Preferred Stock for all previous years shall have been declared and shall have become payable, and the accrued quarter-yearly installments for the current year shall have been declared, and the corporation shall have paid such cumulative dividends for previous years and such accrued quarter-yearly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the Board of Directors may declare dividends on the

Common Stock, payable then or thereafter, out of any remaining surplus or net profits.

In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the corporation, the holders of the Preferred Stock shall be entitled to be paid in full both the par amount of their shares and the unpaid dividends [fol. 272] accrued thereon, before any amount shall be paid to the holders of the 6½% Second Cumulative Preferred Stock or of the Common Stock; and after the payment to the holders of the Preferred Stock of its par value, and the unpaid accrued dividends thereon, the holders of the 6½% Second Cumulative Preferred Stock shall be entitled in the event of voluntary liquidation or dissolution or winding up to the amount of Seven Dollars and Thirty-five Cents (\$7.35) on their shares and in the event of involuntary liquidation or dissolution or winding up to the par amount of their shares, in each case with the amount of unpaid dividends accrued thereon, before any amount shall be paid to the holders of the Common Stock; and after such payments to the holders of Preferred Stock and 6½% Second Cumulative Preferred Stock the remaining assets and funds shall be divided and paid to the holders of the Common Stock according to their respective shares.

Except as provided below, the corporation may redeem at its option the whole or any part (pro rata or by lot) of the 6½% Second Cumulative Preferred Stock outstanding at any time by paying therefor in cash Seven Dollars and Thirty-five Cents (\$7.35) per share plus accrued unpaid dividends thereon to the date fixed for such redemption (herein called the "redemption price"), by mailing notice of such redemption to the holders of record of such 6½% Second Cumulative Preferred Stock so to be redeemed at their respective addresses as the same may appear on the books of the corporation as of a date, not more than fifty days prior to the redemption date, as shall be established by the Board of Directors of the corporation. Such notice shall specify the time and

place of redemption and shall be mailed at least thirty days prior to the date specified therein for redemption. So long as any shares of Preferred Stock are outstanding the corporation will not redeem any shares of 6½% Second Cumulative Preferred Stock unless all dividends upon the Preferred Stock and the full dividends for the then current quarterly dividend period thereon shall have been paid or declared and a sum sufficient for the payment thereof set apart. Unless all dividends upon 6½% Second Cumulative Preferred Stock shall have been paid and the full dividends thereon for the then current quarterly dividend period shall have been paid or declared and a sum sufficient for the payment thereof set apart, the corporation shall not redeem less than all outstanding shares of 6½% Second Cumulative Preferred Stock.

If the aforesaid notice of redemption of shares of 6½% Second Cumulative Preferred Stock shall have been duly given, and if on or before the redemption date the funds necessary for such redemption shall have been set aside by the corporation, separate and apart from its other funds, in trust for the pro rata benefit of the holders of shares so called for redemption, then, notwithstanding that any certificate for shares of 6½% Second Cumulative Preferred Stock so called for redemption shall not have been surrendered for cancellation, the shares represented thereby shall not be deemed outstanding, dividends thereon shall cease to accrue from and after the redemption date, and all rights with respect to such 6½% Second Cumulative Preferred Stock so called for redemption shall forthwith after such redemption date cease and determine, except only the right to receive the redemption price therefor, but without interest; and if on or before the redemption date the corporation shall deposit in trust with any bank or trust company in the United States having a capital and undivided surplus of at least three million dollars (\$3,000,000) to be applied to the redemption of

the shares of 6½% Second Cumulative Preferred Stock so called for redemption, funds sufficient for such redemption, and shall have given notice of redemption as aforesaid or shall have given the bank or trust company irrevocable authority to give such notice, then from and after the date of such deposit all rights of holders of the 6½% Second Cumulative Preferred Stock so called for redemption shall cease, [fol. 273] except the right to receive the redemption price therefor, but without interest. Any interest accrued on such funds shall be paid to the corporation. Any funds so set aside or deposited and unclaimed at the end of six years from such redemption date shall be released and repaid to the corporation, and such holders of such 6½% Second Cumulative Preferred Stock so called for redemption as shall not have received the redemption price prior to such release and repayment to the corporation shall look only to the corporation for payment thereof without interest.

No dividend upon the Common Stock in excess of six per centum per annum shall be declared or paid, if thereby the assets of the corporation applicable to the payment of dividends, as determined by the Board of Directors, shall be reduced to an amount less than Two Million Dollars (\$2,000,000).

There are hereby reserved for issuance and sale under any stock option plan, as adopted and as amended by the stockholders by a majority of the votes cast at any properly constituted meeting of stockholders, 250,000 shares of Common Stock of the corporation, par value Twelve Dollars and Fifty Cents (\$12.50) each (except that in the event of any change in the number of outstanding shares of Common Stock of the corporation by reason of split-ups or combinations of shares, or recapitalizations, or by reason of stock dividends, the number of shares so reserved may be adjusted so as to reflect such change); and no stockholder shall be entitled as a matter of right to subscribe for, purchase or receive any shares of Common Stock so reserved or have any

preemptive or preferential right to subscribe for or purchase the same."

(c) The first paragraph of Article 4 is amended to read as follows:

"The general officers of this corporation shall be a Chairman of the Board, a President, one or more Vice-Presidents, a Secretary and a Treasurer. The number of directors shall be fixed by the By-laws, but such number shall not be more than fifteen until the date of the annual meeting of the stockholders of the corporation scheduled to be held in the corporation's fiscal year ending October 31, 1957."

(d) The second paragraph of Article 7 is amended to read as follows:

"At every meeting of stockholders each holder of Preferred Stock shall be entitled to eight votes in person or by proxy, and each holder of Common Stock shall be entitled to one vote in person or by proxy, for each share of the capital stock standing in the name of such stockholder on the books of the corporation, except where a date shall have been fixed as a record date for the determination of stockholders entitled to vote as hereinafter provided. The By-laws may fix or authorize the Board of Directors to fix in advance a date not exceeding thirty (30) days preceding the date of any meeting of stockholders, or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any change, conversion or exchange of capital stock shall go into effect, as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting, or entitled to receive payment of any such dividend, or entitled to any such allotment of rights, or to exercise the rights in respect of any such change, conversion or exchange of capital stock; and in such case only such stockholders as shall be stockholders of record at the close of business on the date so fixed shall be entitled to such notice of and to vote at such meeting, or to

receive such allotment of rights, or to exercise such rights, as the case may be, notwithstanding any transfer of any stock on the books of the corporation after any such record date fixed as aforesaid. In the event that six quarterly dividends on the 6½% Second Cumulative Preferred Stock, whether or not consecutive, shall be unpaid, in whole or in part, the holders of the outstanding 6½% Second Cumulative Preferred Stock, voting separately as a class, shall be entitled at the next annual meeting to elect two directors. Such voting power shall so continue to vest in the 6½% Second Cumulative Preferred Stock until all arrears in payment of quarterly dividends thereon shall have been paid and the dividends thereon for the current quarter shall have been declared and funds for the payment thereof set apart, and upon the happening of such event the 6½% Second Cumulative Preferred Stock shall be divested of such voting power, but subject always to the same provisions for the vesting of such voting power in the 6½% Second Cumulative Preferred Stock in the case of any similar future default.

At any annual meeting at which the 6½% Second Cumulative Preferred Stock shall be entitled to elect directors, the holders of a majority in interest of the then outstanding 6½% Second Cumulative Preferred Stock, whether present in person or by proxy, shall constitute a quorum for that purpose, and a plurality of the votes of the 6½% Second Cumulative Preferred Stock at such a meeting at which such a quorum is present shall be sufficient to elect the directors whom the holders of 6½% Second Cumulative Preferred Stock are entitled to elect. The persons so elected as directors, together with the directors elected by the Preferred and Common Stock, shall constitute the Board of Directors of the corporation.

No amendment, alteration or repeal of the Articles of Association or of the By-laws of the corporation which materially adversely affects the preferences, privileges or voting powers of the Preferred

Stock or the 6½% Second Cumulative Preferred Stock shall be made without the favorable vote of at least two-thirds in interest of the outstanding shares of the class of stock so affected, voting as a class."

Article 4. Directors of the Surviving Corporation. Upon the merger becoming effective, the following persons shall become directors of the Corporation, to serve until the first annual meeting of stockholders of the Corporation to be held after the merger has become effective and until their successors shall be duly elected and qualified:

Messrs. A. O. Choate, William Ewing, L. R. Clausen, H. S. Sturgis, C. M. Robertson, Frederick Ny-meyer, John T. Brown, H. G. Barr, Wm. J. Grede, E. P. Hamilton, Wm. B. Peters, Allan B. Kline, Marc B. Rojzman, Edward L. Elliott and Mentor Kraus.

Article 5. Terms and Conditions of the Merger and Consolidation, Conversion of Shares, etc. The terms and conditions of the merger and consolidation, the mode of carrying the same into effect, and the manner and basis of converting the shares of ATC into shares of the Corporation are as follows: —

(a) Each of the issued and outstanding shares of Common Stock of ATC shall upon the effectiveness of this merger and consolidation, except as provided below, automatically and without any action on the part of the holder thereof be converted into and be deemed to be (i) one-half of one share of Common Stock of the Corporation and (ii) one share of 6½% Second Cumulative Preferred Stock, par value \$7 a share, of the Corporation. Each holder of shares of Common Stock of ATC, upon surrender to the Corporation's duly authorized agent of one or more certificates for such shares for cancellation, shall thereafter be entitled to receive certificates representing the number of shares of Common Stock and 6½% Second Cumulative Preferred Stock of the Corporation to which such holder is entitled as above provided. No frac-

tional shares of Common Stock of the Corporation shall be issued pursuant to this paragraph (a). In lieu of such a fractional share the Corporation shall at its election deliver to any registered holder of a number of shares of Common Stock of ATC which is not evenly divisible by two (i) \$7.00 in cash or (ii) non-voting [fol. 275] and non-dividend bearing scrip certificates (exchangeable within such period as may be fixed by the Board of Directors of the Corporation, upon surrender thereof with other scrip certificates aggregating one or more full shares, for stock certificates for the full number of shares of Common Stock of the Corporation represented) for such fraction, in such form and containing such terms and conditions as the Board of Directors may approve.

(b) Unless, and until any outstanding certificates of Common Stock of ATC shall be surrendered for exchange, no dividend payable to holders of record of Common Stock or $6\frac{1}{2}\%$ Second Cumulative Preferred Stock of the Corporation shall be paid to the holders of such outstanding certificates on account thereof, but upon surrender of such certificates of Common Stock of ATC there shall be paid to the record holder of the certificates for the Common Stock and $6\frac{1}{2}\%$ Second Cumulative Preferred Stock of the Corporation, into which such shares shall have been changed, all dividends which have become payable thereon.

(c) Each of the outstanding Warrants to purchase Common Stock of ATC shall upon the effectiveness of the merger and consolidation, except as provided below, automatically and without any action on the part of the holder thereof be converted into and be deemed to be a Warrant entitling the holder to purchase (i) in lieu of each full share of Common Stock of ATC, the following for a price of \$16: (A) one-half of one share of Common Stock of the Corporation, and (B) one share of $6\frac{1}{2}\%$ Second Cumulative Preferred Stock of the Corporation; and (ii) in lieu of any fraction of a share of Common Stock of ATC, a corresponding fraction of

the above combination of Common Stock and 6½% Second Cumulative Preferred Stock at a corresponding fraction of the price of \$16. Warrants may be combined to permit the purchase of full shares. No fractional shares of Common Stock or 6½% Second Cumulative Preferred Stock of the Corporation shall be issued on the exercise of such Warrants. In the event that any person exercising such Warrants would otherwise become entitled to a fractional share of such Common Stock or such 6½% Second Cumulative Preferred Stock, the Corporation may, at its election, in lieu thereof (i) pay an amount in cash equal to such fraction multiplied by the market value of such Common Stock or 6½% Second Cumulative Preferred Stock, as the case may be, at the close of business on the day of surrender of the Warrant, or (ii) issue non-voting and non-dividend bearing scrip certificates (similar to those provided in paragraph (a) above) for such fraction of Common Stock or 6½% Second Cumulative Preferred Stock. Upon the effectiveness of the merger and consolidation all Warrants held by the Corporation shall be terminated.

Article 6. Stockholder Votes. (a) Of the 2,262,766 shares of Common Stock and the 92,906 shares of 7% Cumulative Preferred Stock of the Corporation outstanding and entitled to vote on the merger and consolidation, 1,592,474 shares of Common Stock and 73,433 shares of 7% Cumulative Preferred Stock were voted for and 143,088 shares of Common Stock and 785 shares of 7% Cumulative Preferred Stock were voted against the merger and consolidation.

(b) Of the 1,111,057 shares of Common Stock of ATC outstanding and entitled to vote on the merger and consolidation, 927,599 shares were voted for and 3,810 shares were voted against the merger and consolidation.

Article 7. Abandonment of Merger. (a) The merger and consolidation herein provided for may be terminated and abandoned by the Board of Directors of the Corporation at any time before or within five days after both meetings of stockholders have been held if, in the opinion of such board,

[fol. 276] the merger is inadvisable or impracticable by reason of the fact that, in the opinion of such Board, written objections to the merger have been filed (in accordance with the provisions of Section 180.69 of Wisconsin Statutes 1955 or Section 91 of the Stock Corporation Law of New York as the case may be) with respect to a substantial number of shares of capital stock of ATC and the Corporation or of any one of them, and such merger and consolidation may also be terminated and abandoned by the Board of Directors of ATC at any time within five days after both meetings of stockholders have been held if due approval of the stockholders of the Corporation is not obtained to a revision of the Corporation's Stock Option Plan increasing the maximum aggregate number of shares of the Corporation's Common Stock with respect to which options can be issued under such Plan to 250,000 and increasing the number of shares of Common Stock with respect to which options can be issued to any one employee of the Corporation to 25,000.

(b) The merger and consolidation herein provided for may be terminated and abandoned at any time before its effective date:

(i) by mutual consent of the Boards of Directors of the Corporation and ATC, or

(ii) by the Board of Directors of ATC unless, prior to the effective date of the merger, the Commissioner of Internal Revenue makes a ruling satisfactory to such Board of Directors that the merger will constitute a tax-free reorganization and that a sale of shares of 6½% Second Cumulative Preferred Stock of Case will be considered to fall within an exception provided in Section 306(b)(4) or Section 306(c)(2) of the Revenue Code of 1954;

(c) The Corporation and ATC may mutually agree at any time to waive their respective rights to abandon the merger under this Article 7.

Article 8. Miscellaneous. (a) The Corporation may be sued in New York State for any obligation of ATC, a New

York corporation, and it irrevocably appoints the Secretary of State of the State of New York as its agent to accept service of process in any action for the enforcement of payment of obligations.

(b) For all purposes of the laws of the State of Wisconsin, the merger and consolidation herein provided for shall become effective on the due recording of these articles in the office of the Register of Deeds of Racine County in the State of Wisconsin.

For all purposes of the laws of the State of New York the merger and consolidation herein provided for shall become effective when this certificate and the accompanying affidavit shall have been duly filed in the office of the Department of State of the State of New York.

In Witness Whereof we have subscribed and acknowledged these Articles and this Certificate and the same have been signed in the name and on behalf of each corporation party hereto the 9th day of January, 1957.

[SEAL]

John T. Brown, President and Chairman of the Board of J. I. Case Company.

L. T. Newman, Secretary of J. I. Case Company.

[SEAL]

Marc B. Rojzman, President of American Tractor Corporation.

Lillian D. Rojzman, Secretary of American Tractor Corporation.

[fol. 277]

State of Wisconsin,
County of Racine, ss.:

On the 9th day of January, 1957 before me personally came John T. Brown and L. T. Newman, to me known and known to me to be the persons described in and who executed the foregoing Certificate and Articles on behalf of J. I. Case Company, and they severally duly acknowledged that they executed the same.

Thoros Wardell, Notary Public, Racine County, Wisconsin. My Commission expires June 19, 1960.

State of Wisconsin,
County of Racine, ss.:

On the 9th day of January, 1957 before me personally came Marc B. Rojzman and Lillian D. Rojzman, to me known and known to me to be the persons described in and who executed the foregoing Certificate and Articles on behalf of American Tractor Corporation, and they severally duly acknowledged that they executed the same.

Thoros Wardell, Notary Public, Racine County, Wisconsin. My Commission expires June 19, 1960.

State of Wisconsin,
County of Racine, ss.:

Marc B. Rojzman and Lillian D. Rojzman, being duly sworn, depose and say, and each for himself or herself deposes and says: that he, Marc B. Rojzman, is the President, and that she, Lillian D. Rojzman, is the Secretary, of American Tractor Corporation, a New York corporation and one of the constituent corporations named in the foregoing Certificate of Consolidation and Articles of Merger; that they have been authorized to execute and file such Certificate and Articles by the votes, cast in person or by proxy, of the holders of record of two-thirds of the outstanding shares of such corporation entitled to vote on such consolidation; that such votes were cast at a stockholders' meeting held in New York, New York on January 8, 1957 upon notice as prescribed in Section 45 of the New York Stock Corporation Law to every stockholder of record of said corporation entitled to vote thereon.

MARC B. ROJZMAN

LILLIAN D. ROJZMAN

Subscribed and sworn to before me this 9th day of January, 1957.

Thoros Wardell, Notary Public, Racine County, Wisconsin. My Commission expires June 19, 1960.

[fol. 278]

State of Wisconsin,
County of Racine, ss.:

John T. Brown and L. T. Newman, being duly sworn, depose and say, and each for himself deposes and says: that he, John T. Brown, is the President and Chairman of the Board, and that he, L. T. Newman, is the Secretary, of J. I. Case Company, a Wisconsin corporation and one of the constituent corporations named in the foregoing Certificate of Consolidation and Articles of Merger; that they have been authorized to execute and file such Certificate and Articles by the votes, cast in person or by proxy, of the holders of record of two-thirds of the outstanding shares of Common Stock and two-thirds of the outstanding shares of Preferred Stock of such corporation entitled to vote on such consolidation; that such votes were cast at a stockholders' meeting held in Racine, Wisconsin on November 15, 1956 upon notice as prescribed in Sections 180.24 and 180.64 of the Wisconsin Business Corporation Law to every stockholder of record of said corporation entitled to vote thereon.

JOHN T. BROWN

L. T. NEWMAN

Subscribed and sworn to before me this 9th day of January, 1957.

Thoros Wardell, Notary Public, Racine County, Wisconsin. My Commission expires June 19, 1960.

STATE OF WISCONSIN
Department of State ss

FILED

JAN 10 1957

ROBERT C. ZIMMERMAN
Secretary of State

[fol. 335]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 56C 247

CARL H. BORAK, for and on behalf of himself and all of the other common stockholders of J. I. CASE COMPANY who are similarly situated to him, Plaintiff,

—vs.—

J. I. CASE COMPANY, a Wisconsin corporation, MARC B. ROJTMAN and EDWARD L. ELLIOTT, individually and as representatives of all AMERICAN TRACTOR CORPORATION shareholders who received J. I. CASE COMPANY common and second preferred stock in the merger herein referred to, and their successors in interest, A. O. CHOATE, WILLIAM EWING, L. R. CLAUSEN, H. S. STURGIS, JOHN T. BROWN, H. G. BARR, WILLIAM J. GREDE, E. P. HAMILTON, WILLIAM B. PETERS, LILLIAN ROJTMAN, ELLEN B. ELLIOTT, MENTOR KRAUS, HERBERT H. BLOOM, ALLEN NORTHEY JONES, C. J. REESE, C. W. JOHNSON, EARL GINN, WESLEY TODD, H. W. VANDEVEN, JOHN W. MULFORD, JOAN M. DIXON, ELLIOTT & COMPANY, a partnership, JOHN B. ELLIOTT, MARY E. ELLIOTT, EDWARD A. WALSH, EDNA WALSH, RICHARD PISTELL, JANET PISTELL, GILLIGAN WILL & COMPANY, a partnership, JAMES GILLIGAN, WILLIAM WILL, LOUIS W. ALTER, VERONICA GILLIGAN, NATHANIEL C. BEEBER, individually and as representative of all holders of common stock purchase warrants issued by American Tractor Corporation to the purchasers of its preferred stock, Series 56-1, R. HOWE, L. E. HOWARD and E. KALIK, Defendants.

AMENDED AND SUPPLEMENTAL COMPLAINT—

Filed April 1, 1958

Carl H. Borak, plaintiff, by his attorneys, Bruno V. Bitker, Alex Elson and Arnold I. Shure, alleges upon in-

formation and belief, except as to paragraphs 1 and 2 which are alleged on personal knowledge, as follows:

I. *The Parties—Jurisdiction of the Court:*

1. Plaintiff Carl H. Borak, at all times herein mentioned, was and now is a resident and citizen of the State of Illinois. He is, and at the time of the matters complained of herein was, the registered and beneficial owner of 2000 shares of common stock of J. I. Case Company, formerly J. I. Case Threshing Machine Company (hereinafter referred to as "Case"). Five Hundred shares were purchased in 1952 which became 1000 shares in a subsequent 2 for 1 stock split and 1000 shares in 1955.

[fol. 336] 2. Plaintiff brings this action in a representative capacity on behalf of himself and all of the other common stockholders of Case who are similarly situated to him. Such stockholders constitute a class of more than 8000 persons and are so numerous it is impracticable for all to join as plaintiffs. Plaintiff is well able to represent such common stockholders fairly and effectively.

3. Defendant Case, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, is a resident of and doing business in that state and has its principal office in that state.

4. The other defendants and their states of residence are as follows:

a) *Directors and Former Director of Case, Periods in Office and Other Positions With Case:*

	<u>Director</u> <u>From To</u>	<u>Other Position</u> <u>Held with Case</u>	<u>Citizen</u> <u>of</u>
L. R. Clausen	1924 -	Consultant, and former President	Wisc.
John T. Brown	1947 -	Chairman of Board of Directors and President	Wisc.
H. G. Barr	1952 -	Vice President	Wisc.
William J. Grede	1953 -	Chairman of Executive Committee	Wisc.
William B. Peters	1955 -	Vice President and Treas.	Wisc.
Marc B. Rojzman	1957 -	Executive Vice President and General Manager	Wisc.
A. O. Choate	1914 - 1957		N. Y.
William Ewing	1920 -		N. Y.
H. S. Sturgis	1927 -		N. Y.
E. P. Hamilton	1953 -		Wisc.
Edward L. Elliott	1957 -		N. J.
Mentor Kraus	1957 -		Ind.
Herbert H. Bloom	1957 -	President of J. I. Case International S.A.	Wisc.
Allen Northey Jones	1957 -		N. Y.

b) *Continental Motors Group*

<u>Defendant</u>	<u>Citizen of</u>
C. J. Reese	Michigan
C. W. Johnson	Michigan
• Earl Ginn	Michigan
Wesley Todd	Wisconsin
H. W. Vandeven	Michigan
John W. Mulford	Michigan
Joan M. Dixon	Michigan

c) *Elliott Group*

<u>Defendant</u>	<u>Relationship to Other Parties Defendant</u>	<u>Citizen of</u>
Ellen B. Elliott	Wife of Edward L. Elliott	N. J.
Elliott & Company,	A partnership composed of Edward L. Elliott, Edward A. Walsh and Richard Pistell	N. Y.
John B. Elliott [fol. 337]	Son of Edward L. Elliott	N. J.
Mary E. Elliott	Daughter of Edward L. Elliott	N. J.
Edward A. Walsh	Partner of Elliott & Company	N. Y.
Edna Walsh	Wife of Edward A. Walsh	N. Y.
Richard Pistell	Partner of Elliott & Company	N. Y.
Janet Pistell	Wife of Richard Pistell	N. Y.

d) *Gilligan Will Group*

<u>Defendant</u>	<u>Relationship to Other Parties Defendant</u>	<u>Citizen of</u>
Gilligan Will & Co., a partnership	Partnership composed of James Gilligan and William Will.	N. Y.
James Gilligan	Partner of Gilligan Will & Co.	N. Y.
William Will	Partner of Gilligan Will & Co.	N. Y.
Louis W. Alter	Partner or employee of Gilligan Will & Co.	N. Y.
Vernonica Gilligan	Wife of James Gilligan	N. Y.
Nathaniel C. Beeber	Broker trading through Gilligan Will & Co.	N. Y.
R. Howe	Partner or employee of Gilligan Will & Co.	N. Y.
L. E. Howard	Partner or employee of Gilligan Will & Co.	N. Y.
E. Kalik	Partner or employee of Gilligan Will & Co.	N. Y.

e) *Other Defendant*

<u>Defendant</u>	<u>Relationship to Other Parties Defendant</u>	<u>Citizen of</u>
Lillian B. Rojzman	Wife of Marc B. Rojzman	Wis.

A majority of the directors of Case are named as defendants. All defendants who are now Case directors are sued individually and in their capacities as such directors.

Defendants Jones and Bloom became Case directors after the events complained of herein and are named as defendants only for the purpose of securing relief. Marc B. Rojzman (hereafter referred to as "Rojzman"), and Edward L. Elliott (hereafter referred to as "Elliott"), are sued individually and as representatives of all ATC shareholders who received Case common and second preferred stock in consequence of the Case-ATC merger. Such shareholders constitute a class so numerous as to make it impracticable to bring them all before the Court. All such shareholders are made parties as a class for the purpose of securing certain relief herein requested against this class. The interests of all members of such class are fairly and adequately represented by Rojzman and Elliott. Nathaniel C. Beeber is sued individually and as a representative of [fol. 338] all holders of common stock purchase warrants issued by ATC to the purchasers of its preferred stock, Series 56-1. Such holders constitute a class so numerous it is impracticable to bring them all before the Court. All such holders are made a class for the purpose of securing certain relief herein requested against this class. The interests of all members of the class are fairly and adequately represented by Beeber. All defendants are citizens and residents of states other than Illinois.

[fol. 339] 5. Jurisdiction is conferred on this Court by Section 1332 of the Judicial Code in that there is diversity of citizenship between the plaintiff and all defendants and in that the sum or value in controversy, exclusive of interests and costs, exceeds \$3000.

6. This action is not a collusive one instituted for the purpose of conferring upon a court of the United States jurisdiction of a cause of action over which it would not otherwise have cognizance.

7. Plaintiff brings this action to secure relief from a purported statutory merger between Case and American Tractor Corporation ("ATC"), formerly a New York corpo-

ration, and from amendments to a stock option plan which purportedly were adopted by Case. Both the merger plan and stock option amendments purportedly were approved by the shareholders of Case at a special meeting held on November 15, 1956. The merger plan, which required the favorable vote of two-thirds of the outstanding common and preferred stock, each voting separately as a class, was declared approved by a close margin. It received only 1,592,474 favorable votes, only 83,964 more than the 1,508,510 votes necessary. This action was filed on November 13, 1956, shortly before the November 15, 1956 shareholders' meeting. On January 10, 1957, Case and ATC purportedly completed action required under the laws of Wisconsin and New York to consummate the merger. Both the merger and stock option proposal were formally announced to the shareholders about October 15, 1956 by means of a brochure which included a letter dated October 15, 1956, from J. T. Brown, President and Chairman of the Board of Directors of Case, a notice of the November 15, 1956 special meeting of stockholders and a proxy statement describing the plan. Also included were the plan of merger, articles of merger and certificate of consolidation. The brochure is attached to the original complaint as Exhibit A and is incorporated herein by reference.

II. *The Case-ATC Merger—Wrongful Acts of Case Directors:*

8. Case is a full line producer of farm machinery, including tractors and all of the equipment generally used in plowing, tilling, fertilizing, planting and seeding, cultivating, making silage and harvesting grains, seeds, corn and many other crops. In addition, it produces and sells for non-farm use wheel tractors and power engine units. It [fol. 340] and its predecessors have been in the farm machinery business since 1842.

9. As of July 31, 1956, Case had a net worth of \$90,516,105. The shareholders' equity was represented by:

Preferred Stock, 7% \$100 par, Authorized, 101,825, issued 92,906	\$ 9,290,600
Common Stock, \$12.50 par, Authorized, 4,000,000, issued 2,262,706	28,284,575
Paid-in Surplus	10,008,314
Earned Surplus	42,932,616
	<hr/>
Total Net Worth	\$90,516,105
	<hr/>

Book value of common stock was about \$36.00 per share. The Case balance sheet as of July 31, 1956 is set out on pages 24 and 25 of the Proxy Statement.

10. Immediately after World War II and continuing through the Korean War, Case enjoyed good sales and earnings, but from about 1952 to 1956 the situation was less bright. Sales decreased from about \$153,000,000 in fiscal 1952 to \$95,000,000 in fiscal 1955, while profits fell from over \$7,000,000 to less than \$1,000,000 in the period. (The fiscal year ends October 31). Dividends were affected: \$2.50 per share was paid on common in fiscal 1952; \$2.00 in 1953, \$.50 in 1954 and none in 1955. The falling sales, earnings, and lack of dividends were reflected in the market price of the common stock: In calendar 1955 the high was only 19½ despite the flurry mentioned below, in contrast with a high of 36½ in 1952. As the 1956 fiscal year progressed, it was apparent that sales were continuing to fall and that a loss for the year would be sustained. Nevertheless, the company's fundamental position was sound; its products enjoyed an excellent reputation, its liquid position was good, and losses to date relatively small.

11. The directors of Case in large part, were a dispersed group whose principal interests lay with other business concerns and who were not able to devote any great portion of their time to Case affairs. According to the proxy statement the Case directors owned collectively only about 30,710 shares of Case common stock with individual holdings ranging as follows: two directors owned 16 and 100 [fol. 341] shares each, three owned blocks of approximately 1000 shares each, five owned blocks of approximately 2000

shares each and two others owned 4,276 and 12,900 shares each. As a group they were advancing in years. About August 1955 the directors established a five-man executive committee of the board of directors which included defendant Brown, Chairman of the Board of Directors and President, defendant Grede, who became Chairman of the Executive Committee in July 1956, and C. M. Robertson, general counsel of Case. (Brown, Grede and Robertson are hereafter referred to as the "management group"). The management group, after August 1955, formulated the major business decisions of Case. Brown, Grede and Robertson respectively owned 2420, 1100 and 2000 shares of Case common stock. The directors, other than the managing group, as more fully alleged below, failed to exercise independent judgment as to crucial decisions involving Case.

12. The company's immediate situation was of great concern to the management group. They had reason to fear and did fear that the company would become the target of "liquidators" and "raiders"—persons who would seize control of the company by a proxy fight and thereafter possibly bring about a merger with another company on terms unfavorable to Case or to themselves, or take some other action of a related character. In the Fall of 1955 Brown had been approached by one person claiming to control a large block of Case stock who proposed the sale of the Case assets to a corporation to be dominated by himself and his associates. This proposal was presented to the Board of Directors, considered and rejected. In late 1955 there was a sudden flurry in Case common stock on the New York Stock Exchange during which the stock advanced on large volume trading. This incident gave the management group cause to fear that "raiders" were buying up Case common intending to initiate a proxy war. Their grounds for fear were further enhanced by the circumstance that increasing amounts of stock were being registered in "street names", i.e., in the name of stock brokerage houses, rather than in the names of the beneficial owners.

The management group feared the result of a proxy fight. The directors themselves owned or controlled much

less than 2% of the stock, the bulk of which was widely scattered among thousands of holders. In the event of a contest, if in fact "raiders" had acquired the stock, the only [fol. 342] large holding would be opposed to them while the numerous small shareholders, disaffected by falling sales, earnings and stock market prices and lack of dividends, might well vote for new management.

13. Because of the facts alleged above, the management group began a search for a merger which would allay shareholder unrest and solidify their position in the event of a proxy contest. Inquiries were made concerning several companies. Negotiations, which ultimately collapsed, were undertaken by the management group with Oliver Corporation and Minneapolis-Moline Co., during the course of which all directors in general were kept fully informed or actively participated in the negotiations. In addition to these negotiations, negotiations were opened with ATC about January 1956.

14. ATC, founded in 1948, commenced producing crawler tractors and related attachments in a plant at Churubusco, Ind. Since ATC bought the principal components such as engines, transmissions, etc., it was engaged largely in an assembly operation.

15. As of July 31, 1956, according to the balance sheet, page 31 of the Proxy Statement, ATC had net assets of \$2,525,653. The shareholders' equity was represented by:

Convertible preferred stock, Series 55-1	
\$20.00 par, 12,500 shares	\$ 250,000
Convertible preferred stock, Series 56-1	
\$20.00 par, 50,000 shares	1,000,000
Common stock, 25¢ par,	
2,000,000 shares authorized	
1,107,704 shares outstanding	276,926
Paid-in surplus	619,076
Earned surplus	379,651
	<u>\$2,525,653</u>

There were then outstanding 50,000 warrants to purchase 90,000 shares of ATC common at \$16.00 per share and options to purchase 9,547 shares of ATC common. Book value of the common stock was about \$1.15 per share.

16. In the Summer of 1956 the position of ATC was critical because of lack of working funds: as of July 31, 1956, ATC had only about \$281,000 in cash to meet current liabilities, as shown on the balance sheet, of about \$2,350,000, and in addition thereto, \$542,000 owing on July 31, [fol. 343] 1956, due in future periods for machinery and equipment rental. Borrowing was almost out of the question because a large part of the accounts receivable had been pledged to secure loans, and all fixed assets were encumbered by first and second mortgages on which heavy fixed payments were due. Moreover, ATC was contingently liable for about \$1,199,000 on conditional sales contracts sold to a bank.

Earnings and losses from January 1, 1952 to July 31, 1956 were as follows:

Year ended	12/31/52	\$ 39,908 loss
8 mos. ended	8/31/53	88,814 loss
Year ended	8/31/54	166,871 loss
Year ended	8/31/55	346,782 profit
11 mos. ended	7/31/56	306,211 profit

Average profit for this period on an annual basis was about \$78,000. No dividends were ever paid on the common nor could any dividends be paid so long as a \$900,000 first mortgage remained outstanding.

17. The status of the Case-ATC negotiations to January 25, 1956 were summarized by Brown and Frederick Nymeyer, a director, at a meeting of the Executive Committee on January 25, 1956. The report of the Executive Committee for that date states:

"In reporting on the discussion with Mr. Rojzman concerning the possible sale of the American Tractor Company to the J. I. Case Company, Mr. Brown and Mr. Nymeyer stated that Mr. Rojzman's first offer was a straight share for share exchange of J. I. Case stock

for American Tractor stock. Mr. Rojzman made this offer on the basis of the market value of \$15 for the American Tractor and \$17 for the J. I. Case Company. He was informed that any transaction would have to take into consideration the wide difference in the book value of the two stocks, which are, Case \$37.75 and American Tractor 91 cents. When Mr. Brown had indicated that Case might be interested in paying cash for some American Tractor stock, Mr. Rojzman indicated that he thought Case could buy approximately 40% of the American Tractor stock for \$15 or \$16 a share, and that the holders of the remaining 60% of the stock (including his own holdings of 50%) would be willing to take one share of Case for each two shares of American Tractor Company. Both Mr. Ny-meyer and Mr. Brown feel that such an arrangement would result in the Case Company paying too high a price for the American Tractor Company, but no further negotiating was done with Mr. Rojzman because of lack of time.

"In reporting on the situation, Mr. Brown stated that it was his opinion that we were too far apart at this time to reach any agreement. He felt that the Case Company would be willing to pay \$8,000,000 or \$9,000,000 for the American Tractor Company, but that before such an arrangement was made, if it became possible to do so, he would want to

[fol. 344]

- "1. Thoroughly investigate the product of the American Tractor Company as to performance, reputation, and marketing outlets.
- "2. Investigate the design, new development, and present situation, and
- "3. Determine more accurately how much additional money the Case Company would have to invest in the Company in order for it to handle the projected volume of business."

18. About February 1, 1956 Brown ordered a report from William E. Hill and Company, management consult-

ants, regarding ATC. This report, which was delivered March 12, 1956, pointed out that the market for small crawler tractors, ATC's principal business, was limited to light construction and special tasks not including roadbuilding. The Hill report concluded that ATC could compete successfully in the manufacture of small crawler tractors and in time secure a substantial part of this market with annual sales of \$20,000,000 to \$34,000,000. The report also concluded that ATC could not compete successfully in the larger tractor field since it would experience immediately the heavy competition of several large well established firms. The report suggested that a more thorough study be made in the event Case wished to negotiate further with ATC.

19. After Brown received the Hill report the ATC negotiations collapsed. About July 1956 Grede became chairman of the executive committee and about this time the management group, without consultation with all of the other directors, renewed negotiations with ATC. Again, as in the January negotiations, Rojzman insisted upon a merger based on the relative market prices of Case and ATC common which meant a price of about \$17,000,000 for ATC. The Case negotiating committee yielded in principle to this demand despite the previous opinions expressed by Brown and others, despite the fact that for the reasons alleged below the market price of ATC was an unreliable index of value, despite the gross disparity in book value (Case \$36.00 per share, ATC \$1.15) and despite all the other facts herein alleged which made such a basis of exchange unfair to the Case common stockholders. They agreed to the merger terms, moreover, without making the investigation which Brown had indicated should be made prior to making an agreement with ATC.

Early in August a meeting was held between the Case management group which acted as the Case negotiating [fol. 345] committee and the ATC negotiators (consisting of Rojzman, Elliott and Kraus) at which the major terms of the merger were agreed upon, subject to the approval of the directors of the two companies. Under the agreement, each share of ATC common was to be exchanged for one-half share of Case common, plus one share of a new Case second

preferred. The 50,000 ATC warrants outstanding, authorizing the purchase of 90,000 shares of ATC common at \$16 per share were to be convertible on the same basis as ATC common, i.e., for each 5/9ths warrant plus \$16 the holder would be entitled to receive one-half share of Case common plus one share of the new Case Second preferred. In addition, Case agreed to rescue ATC from its financial crisis by the purchase of \$1,000,000 of ATC stock. This stock was to consist of 50,000 shares of a new ATC \$20 par convertible 5% preferred. This purchase was to be made immediately upon approval of the plan by the directors and before shareholder ratification of the merger plan. For an additional \$500.00 Case was to receive 50,000 warrants, good until September 24, 1959, to purchase 90,000 shares of ATC common at \$16 per share. Upon consummation of the merger these warrants were to be cancelled. Further, upon consummation of the merger Case agreed to supply all funds necessary (totaling \$2,362,500) to retire at \$21 per share all outstanding ATC preferred, including the new issue to be purchased by Case. Three ATC directors (Rojtman, Kraus and Elliott) were to become Case directors, (a condition Rojtman and Elliott had early insisted upon) and Brown and Rojtman were to be on the Executive Committee. A major point of dispute was whether Brown or Rojtman was to be president of Case after the merger. Under the terms agreed upon Brown remained President and Chairman of the Board of Directors but as stated in Brown's letter to the shareholders, Exhibit A to the original complaint p. 2, Rojtman became "Executive Vice President and General Manager with responsibility for and authority over the general management of the business affairs of Case."

Also part of the merger agreement was a stock option provision: the Case stock option plan was to be amended to increase the share limit to one person from 10,000 to 25,000 and the total number allocable from 100,000 to 250,000. Brown was to receive an option to purchase 19,000 shares in addition to the 6,000 share option previously [fol. 346] granted to him, and Grede and Rojtman each were to receive options to purchase 25,000 shares. The purchase price specified in the options, which were to have a

life of ten years, was to be the fair market value of the stock at the time of granting the option. These options were granted on January 10, 1957.

The merger terms were incorporated into a memorandum which set out the terms as above and in addition fixed the dividend rate on the second preferred at $6\frac{1}{2}\%$ and the par value and redemption price at \$7.00 and \$7.35, respectively. This memorandum was dated August 24, 1956 but in fact the principal terms had been agreed to by the management group early in August.

20. About the middle of August 1956, the Case management group met informally with a number of the directors. The directors present advised the management group to continue to negotiate in order to obtain the best terms possible. In truth, however, the management group had already committed itself to the principal terms of the merger and was unable or unwilling to negotiate better terms.

21. The market value of the Case common to be exchanged for ATC common pursuant to the August agreement was almost \$8,000,000 and the total par value of the \$7.00 $6\frac{1}{2}\%$ second preferred about \$7,750,000. In addition, Case agreed to pay \$1,312,500 to redeem the ATC preferred outstanding (other than the preferred held by Case itself). Hence the total price to Case of the net assets of ATC was about \$17,000,000, or precisely as alleged below, \$17,078,051. This sum exceeded by at least \$8,000,000 the price which Brown earlier had stated Case should be willing to pay and exceeded by about \$3,000,000 Rojzman's own January, 1956 asking price.

22. At a meeting of the directors on September 6, 1956 Grede presented to the directors the memorandum of terms agreed upon dated August 24 and thereafter the directors formally approved without a single change all of the terms subject to questions of law, taxes, etc. On September 24, 1956, the directors of Case gave final approval to the merger and the same day, before shareholder approval of the merger, Case purchased \$1,000,000 ATC preferred as required by the merger agreement and in addition, for \$500, [fol. 347] purchased the 50,000 warrants described above.

Despite the grave importance of the merger to Case and the Case shareholders both meetings were of a pro forma character and were dominated by the interested management group. After the proposals had been presented by the management group the other directors voted approval with scarcely any consideration or discussion even though Grede and Brown, two of the directors who had negotiated the terms of the merger, were to be the beneficiaries of stock options upon approval of the merger. The other directors failed to make an independent investigation of the facts and did not exercise independent judgment in approving the merger. The management group, by reason of their self-interest, could not and did not exercise independent judgment in voting for the merger. Some of the directors were not even acquainted with the Hill report. Thus the Case common shareholders were deprived of the benefit of the informed, impartial and independent judgment of these directors. Had they made such an independent study and exercised independent judgment they would have known the facts set out in this complaint and would have been under a duty to vote against the merger proposal.

23. Further, the Case directors, instead of valuing the assets of ATC, and then determining the stock to be issued therefor, improperly proceeded in reverse order; they first agreed to the number of Case shares to be issued, which had a total par value of \$14,757,068, and then arbitrarily fixed the value of the ATC assets to be received at precisely this sum, namely, \$14,757,068. This arbitrary valuation was fixed in a pro forma manner at a meeting of the directors on October 1, 1956, subsequent to their approval of the merger terms on September 6, 1956 and September 24, 1956.

24. At no time did the directors of Case make or cause to be made an independent appraisal of the value of the ATC physical assets to be received by Case. At the October 1, 1956 directors' meeting, however, the directors in pro forma manner voted to value the physical assets of ATC at about \$2,943,213, purporting to rely on an appraisal prepared by W. F. MacConnell and Co. This firm had done appraisal work for ATC for some years prior to the merger and in fact the MacConnell appraisal relied upon by the

Case directors was ordered by ATC several months prior to the merger. Moreover, when the Case directors made the [fol. 348] valuation on October 1, 1956, some of them had never seen the appraisal while others had never even heard of it. The valuation fixed in this capricious manner was more than double the book value of the assets on the books of ATC.

25. The then directors of Case in approving the merger plan, in authorizing the purchase of \$1,000,000 ATC preferred, and in recommending the merger proposal to the shareholders violated their fiduciary responsibilities to the shareholders by reason of the following which they knew or should have known:

- a) *The price paid for ATC was excessive in relation to ATC earnings:*

ATC in its most prosperous year earned less than \$350,000 or about 32¢ per share giving effect to the 1955 stock split, and thus a purchase price exceeding \$17,000,000 was more than fifty times the earnings for the company's best year, a grossly excessive ratio. Thus, the price, even on the basis of ATC's best year, is grossly excessive. If the \$78,000 average earnings of ATC from 1952 to 1956 are considered (about 7¢ per share) the purchase price becomes about 218 times earnings.

- b) *In respect to earnings ATC was grossly overvalued and Case grossly undervalued:*

For the period from fiscal 1951 to July 1956 the average earnings of Case common were \$.81 per share. For purposes of the merger, Case exchanged for each share of ATC stock—average earnings about 7¢, one-half share of Case common (average earnings 40½¢ plus 1 share \$7.00, 6½% second preferred, dividend 45½¢ a total of \$.86. An exchange on this basis was grossly unfair to the Case common shareholders.

- c) *In respect of book value, ATC was grossly overvalued and Case grossly undervalued.*

As appears from the statement of financial condition of ATC (Proxy Statement, page 31) the book value of the assets of ATC acquired by Case was \$2,525,653. The book value of ATC common stock only was about \$1,275,653 or about \$1.15 per share in contrast with a book value of \$36 per share for the common stock of Case. Not considering the inflated value placed on ATC assets, on a book value basis ATC shareholders received about \$20.26 in book value for each of their shares (one-half share Case Common, book value after the merger \$13.26 plus one share Case second preferred, par \$7). In total, ATC shareholders received [fol. 349] Case common stock having a book value of about \$14,685,799 plus preferred stock paying 6½% dividends, and having a par value of \$7,753,928 or a total of about \$22,400,000 in exchange for shares which had a book value of \$1,275,653. The book value exchange ratio which was in excess of 17 to 1 was grossly unfair to the Case common shareholders.

- d) *The directors wrongfully relied on the market price of ATC common as a measure of value of ATC.*

The directors of Case and particularly the management group placed great weight on the stock market price of ATC common in agreeing to the terms of the merger. The market price, however, of the stock of a new company marketing unproved products without established earnings is not a proper index of value. Further, the stock market price for ATC common was not a free market price.

- e) *The Case directors improperly considered as an element of value the projected future earnings of ATC.*

From time to time in the course of negotiations, Rojzman presented to the Case management group his estimates of the future sales and earnings of ATC. The management group and the other Case directors relied to a substantial

extent on these estimates in placing a value on ATC. Because ATC was a new company whose brief business life had been marked by losses in three out of the past five fiscal periods, future earnings were so speculative in nature they were incapable of valuation and as a matter of law should not have been used as a basis for valuation. Moreover, the worth of ATC's products was undetermined; none of the small models of crawler tractors had been in service for long and some of the medium size tractors were not yet in production. Important design changes had been constant during the brief history of ATC and hence it was impossible to judge how they would withstand service. Further, future earnings were an improper test of value because of the company's limited growth potential.

- f) *The Case directors failed to give proper weight to the large investment to be required to continue ATC operations:*

The directors of Case failed to consider that even the \$17,000,000 price would not represent the full cost of ATC [fol. 350] to Case. At the time of the merger, ATC was so critically short of cash that it was scarcely a viable entity, and in fact it was necessary for Case to invest \$1,000,000 in ATC before shareholder approval of the merger so that it could survive. Merely to finance its current level of operations, ATC required a considerable sum in cash in addition to this \$1,000,000. These sums are part of the real cost of ATC to Case.

- g) *The directors improperly considered as an element of value the future services to be rendered by Rojzman and other officers of ATC.*

The Case directors in valuing ATC improperly included as an element of value the future services of Rojzman and other ATC officers. Future services are never an element of value.

The directors of Case, moreover, did not include as one of the merger terms, a contract by Rojzman to devote his services to Case. Since he is thus free to leave Case at any

time, his future services for this further reason, were not a proper element in valuing ATC.

- h) *The directors of Case failed to make an independent appraisal of the assets of ATC as an entity and of the value of the physical assets of ATC.*

The directors of Case failed to make an independent appraisal of the assets of ATC as an entity and of the value of the physical assets of ATC.

- i) *The directors placed control of Case in the hands of Rojzman, Elliott and the Elliott group.*

Prior to the ATC merger the Case common stock had been widely scattered among thousands of shareholders no one of whom was able to exercise a predominant voice in the affairs of the corporation. As a result of the merger, however, approximately 80 per cent of the 553,852 shares of Case common issued, or about 440,000 shares out of about 2,800,000 shares of Case common outstanding were concentrated in the hands of Rojzman, Lillian Rojzman, Elliott, Ellen B. Elliott, the Continental Motors group and the Elliott group. The roles of these persons and groups in ATC are set out below. Because of the dispersion of the ownership of the Case stock this block of stock, amounting to about 15% of the common outstanding, constitutes effective working control of the Case company. In the event of shareholder dissatisfaction with the company's management, it is now exceedingly difficult for the shareholders to [fol. 351] secure effective redress because of the concentration of power achieved.

26. The directors of Case in approving the merger plan, in authorizing the purchase of \$1,000,000 ATC preferred and in recommending the merger proposal to the shareholders violated their fiduciary responsibilities to the shareholders and violated the Wisconsin Business Corporation Law by reason of the following:

a) Section 180-14(1) of the Wisconsin Business Corporation Law, as amended, provides:

"Shares having a par value may be issued for such consideration, not less than the par value thereof, as shall be fixed from time to time by the board of directors."

Section 180-15(1) provides:

"The consideration for the issuance of shares may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor or services actually performed for the corporation. When payment of the consideration for which shares are to be issued shall have been received by the corporation such shares shall be deemed to be fully paid, and non-assessable by the corporation."

Section 180-15(3) provides:

"In the absence of fraud in the transaction, the judgment of the board of directors or the shareholders, as the case may be, as to the value of the consideration received for shares shall be conclusive."

b) The directors violated Sec. 180-15(1) in that they included the future earnings of ATC and the future services of Rojzman and other ATC officials as part of the consideration paid by ATC for the issuance of Case shares. Such future earnings and future services are not valid consideration.

c) In fixing the consideration for the shares of stock to be issued by Case to ATC for the assets of ATC, the Board of Directors of Case violated Section 180-14(1) in that the consideration fixed was less than the par value of such securities.

The directors of Case fixed what they describe as "the minimum fair value of the net assets of ATC to be acquired in the merger" at \$14,757,068. (Proxy Statement page 40). [fol. 352] The par value of the Case securities issued was \$14,677,078, determined as follows: ✓

1,107,704 shares of 6½% Second Cumulative Preferred Stock, \$7 par value—

\$ 7,753,928

553,852 shares of Common Stock, \$12.50 par value

6,923,150

\$14,677,078

As part of the merger agreement Case agreed additionally to redeem the preferred stock of ATC at a cost to Case of \$2,362,500. Of this sum \$1,050,000 was received by Case in redemption of the ATC preferred purchased by it on September 24, 1956 but \$1,312,500 was paid to third parties and hence this sum must be deducted from the \$14,757,068 found to be the minimum fair value of ATC assets. Hence the consideration received for the shares is \$13,444,568 which is \$1,232,510 less than par value.

d) Further, since the 50,000 outstanding warrants to purchase ATC common at \$16 became warrants to purchase one-half share of Case and one share of Case second preferred at \$16, these warrants of themselves had a monetary value. This monetary value must also be deducted from the \$14,757,068 and hence the difference between the assets received and the par value of the Case stock issued is even greater than \$1,232,510.

e) In fixing the consideration paid for the shares of Case stock issued to ATC stockholders upon consummation of the merger the directors further violated the requirements of Section 180-14(1) of the Wisconsin Business Corporation Act by making a determination of the "minimum fair value" of the assets received from ATC. The directors were under a clear statutory duty to fix the consideration at a specific amount.

f) The directors of Case did not in fact make the valuation required by Sec. 180-14(1) of the Wisconsin Business Corporation Act for the reason that the purported valuation placed on the assets of ATC represented merely a mechanical computation determined to equal the par value of the stocks which by the terms of the merger agreement Case was obligated to issue to the shareholders of ATC.

[fol. 353] 27. The facts respecting the gross and unjustified over-valuation of ATC assets, in relation to book values and earnings are summarized in the following table:

Table I

**Relative Book Values and Average Earnings
of Case and ATC Common.**

I <i>Book Values</i>	<i>Case Common Shareholders</i>	<i>ATC Common Shareholders</i>
Book value of stock before merger	\$81,225,505	\$ 1,275,653
Per cent of total book values of Case and ATC (preferred ex- cluded)	87.30%	1.37%
Book value after merger :	\$59,998,931*	\$22,439,727*
Per Cent of total book value in merged com- panies	65.41%	24.46%

II
Book Values Per Share

Before merger	\$35.90	\$ 1.15
After merger	\$26.52	\$20.26

III
*Average Earnings***

Before merger, after deducting preferred dividends	\$ 1,830,718	\$ 15,476
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* Not considering inflated values placed on ATC assets, ATC shareholders received for each share of ATC, 1 share of Case second preferred \$7.00 par (\$7,753,928) and one-half share of Case common book value \$13.26 (\$14,685,799).

** For Case, fiscal years 1951-1955 and nine months to July 31, 1956. For ATC, calendar 1952 to July 31, 1956. Prior periods not available.

	<i>Case Common Shareholders</i>	<i>ATC Common Shareholders</i>
Per cent of total earnings of Case and ATC (preferred excluded)	71.54%	.61 of 1%
After merger, after deducting dividends on Case \$100.00 par preferred	\$ 1,128,489	\$ 780,205
Per cent of total earnings of merged companies (Case \$100 par preferred excluded)	44.10%	30.49%

[fol: 354]

IV

Average Earnings Per Share

Before merger	.81	.07
After merger	.50	.70½

28. For all the reasons alleged herein, the overvaluation of the ATC assets was so gross and so completely unjustified as to constitute a constructive fraud upon the Case common shareholders.

[fol. 355]

III. *Invalidity of the Stock Options—*

29. The 25,000 share option to Grede was void for the following reasons: The stock option plan as adopted at a meeting of the Stockholders on April 17, 1952, provided that only "employees of the company" were to be eligible, a term which was defined as follows:

"The term 'employees of the Company' shall include employees of any subsidiary of the Company, shall include officers as well as other employees of the Company, or any subsidiary, and shall include directors of the Company who are also active officers of the Company or any subsidiary".

At no time has Grede been an officer or an employee. Grede's sole position with Case has been as a director and hence under the Plan he was not eligible to receive a stock option. Consequently, the granting of the option to Grede was void.

The stock options to Brown and Grede were void for the further reason that they negotiated the stock options for themselves while representing Case in the merger negotiations.

30. Grede Foundries, Inc., in which Grede has a controlling interest, was a supplier of castings to both Case and ATC prior to the merger. After the merger sales increased substantially. Sales of Grede Foundries Inc. for its 1955 and 1956 fiscal years (ending October 31) to Case and ATC were \$32,935 and \$38,533, respectively. For fiscal 1957, which includes the first ten months after the merger, sales were \$435,073.

IV. *History of ATC and Wrongful Acts of Rojzman, Lillian Rojzman, Elliott, Elliott Group, Continental Motors Group and Gilligan Will group:*

31. a) In 1952 ATC experienced serious mechanical failures as a result of which heavy losses were incurred from January 1952 through August, 1954. These losses were incurred partly because of customer allowances and adjustments, the adverse effect of these failures on customer and dealer relations and partly because of a change in the method of product distribution.

[fol: 356] As a result of continued losses, in the Spring of 1954 the company was in serious financial straits. The earned surplus balance as of August 31, 1954, showed a deficit of \$247,000 and was doubtless substantially that amount in the Spring of the year.

b) Elliott, the senior partner of Elliott and Company, a New York stock brokerage partnership which he had established shortly before, saw in ATC an opportunity for a stock promotion. In May 1954, Elliott negotiated for ATC a loan of \$250,000 from a New York bank and at the same time formed a syndicate composed of his wife, Ellen B.

Elliott and persons largely connected with the Continental Motors Corporation (the Continental group) who lent ATC \$250,000.. Under the loan agreement Elliott and Company was given the option of buying within 5 years at one cent each 20,000 warrants authorizing the purchase of 20,000 shares of ATC common at fifty cents a share and Elliott, as leader of the group of investors, was given a similar option to buy 150,000 warrants. The warrants were issued on May 18, 1954 and were distributed by Elliott to the Continental group and to Ellen B. Elliott who received 60,000 warrants. The \$1700 payment for the warrants was made some time prior to August 31, 1954 and by August 31, 1954 all of the warrants were converted into common stock.

c) Since the loans and sale of warrants in May 1954 exceeded \$300,000 Elliott devised a plan for ATC to avoid registration of the securities under Section 5 of the Securities Act of 1933, 15 U.S.C. §77e, which would have entailed the issuance of a formal prospectus and the revelation of ATC's weak financial condition and recapitalization. Such a revelation would have impeded the stock promotion plan. Elliott avoided SEC registration through recourse to the private offering exemption of Section 4 (1) of the Securities Act of 1933, 15 U.S.C. §77(d). He represented to ATC in the loan agreement that he was taking the note for himself and his principals as an investment with no intention of resale but significantly he failed to make similar representations as to the warrants and stock issuable upon exercise of the warrants. The limited representation made did not exempt the transaction from the Securities Act of 1933. [fol. 357] In a notification filed by ATC with the Securities and Exchange Commission on August 31, 1954, and signed by Rojzman, Elliott is alleged to have made additional representations as to the warrants and stock issuable pursuant to the exercise of the warrants. If in fact such representations were made by Elliott they were false because Elliott knew or should have known that the warrants were exercised almost immediately (all were exercised by August 31, 1954) and that some of the stock received therefore was sold or was to be sold to the public.

d. At or about the same time ATC planned to make a public offering through Elliott and Company of 24,000 shares of ATC common stock at \$4.125 a share and on August 31, 1954, filed under Regulation A of the Securities Act of 1933 a simplified prospectus or offering circular permitted for offerings under \$300,000. Elliott and Company had however, in violation of regulations of the Securities Act of 1933, sold to the public all of the 24,000 shares prior to the filing or approval of the offering circular. Moreover, the offering circular was false, misleading and fraudulent in several material respects:

- 1) The offering circular failed to state affirmatively that 170,000 shares of the same stock being offered in the circular at \$4.12 $\frac{1}{2}$ per share had just been sold at 51¢ per share to Elliott and Company and the Continental group associated with Elliott.
- 2) In order to conceal the above fact, it falsified ATC's financial statements as follows:

A balance sheet dated June 30, 1954 was included in the circular. This date was subsequent to the issuance of the penny warrants and in fact by June 30, 1954 some of them had already been converted into stock. Attached as an exhibit to the balance sheet was a statement of paid-in surplus which should have shown the receipt of the \$1700 from the sale of the 170,000 penny warrants and thus given notice to the prospective purchasers that such warrants were outstanding. The receipt of this sum was, however, omitted from this statement!

[fol. 358]

- 3) Moreover, the issuance of the penny warrants was further concealed by stating that the number of common shares outstanding was 340,695, the number outstanding before the issuance of the warrants. In fact, the number of shares outstanding on June 30, 1954 was greater because of the conversion of some of the warrants into stock.
- 4) Further, the circular by implication represented to the prospective purchasers that there had been no

substantial change in the company's position since June 30, 1954 to its date of issuance, whereas in fact there had been a substantial decrease in the book value of the stock because of the sale of the 170,000 shares at fifty-one cents.

e. Over the counter trading began about July 1954 and on January 17, 1955 ATC common was listed on the American Stock Exchange with defendant Gilligan, Will and Company as the specialist in the stock. Defendant James Gilligan a partner in Gilligan, Will and Co., began to acquire and deal in ATC stock on June 6, 1954. Other partners or employees of Gilligan, Will and Co., including Louis W. Alter, L. E. Howard, R. Howe, William Will and E. Kalik and other persons who traded through Gilligan, Will and Co., including Nathaniel C. Beeber, all of whom are named defendants herein, dealt in ATC stock from 1954 until the merger between Case and ATC. A substantial amount of the total trading in ATC stock was transacted through or by Gilligan, Will and Company.

f. From 1954 until the merger with Case, approximately 80% of the total outstanding stock of ATC was closely held by Marc Rojzman, Lillian Rojzman, Edward L. Elliott, Ellen B. Elliott, their families, friends and associates and the Continental group.

At various times these defendants held large blocks of their stock in the name of Gilligan, Will and Company and other brokers.

g. Commencing in June 1954 and continuing until the merger of ATC with Case, Elliott also initiated a concerted campaign of bringing ATC to the attention of stock brokers, analysts, security investment advisers and anyone else who might help promote ATC stock. Elliott himself brought many such persons to the ATC plant in Churubusco, Indiana.

[fol. 359] h. The total outstanding stock in the hands of the public was small. Total trading in ATC was relatively light with the price often changing widely on narrow trading.

32. Beginning in July 1954 the market price of ATC common enjoyed a spectacular rise. On August 18, 1955 the stock was split 2 for 1. The stock price ranges from the third quarter of 1954 to the third quarter of 1956 were:

	<i>Before Split</i>		<i>After Split and Adjusted for Split</i>	
	<i>High</i>	<i>Low</i>	<i>High</i>	<i>Low</i>
3rd Quarter 1954	5¾*	3**	27⅞*	1½**
4th Quarter 1954	12¾*	7**	63⅞*	3½**
1st Quarter 1955	19¼	12	95⅞	6
2nd Quarter 1955	30	19	15	9½
3rd Quarter 1955			145⅞	12¾
4th Quarter 1955			177⅞	13
1st Quarter 1956			16¼	13⅞
2nd Quarter 1956			14¾	13½
3rd Quarter 1956			15	12⅞

* High offer over-the-counter

** Low bid over-the-counter

33. The foregoing rise in price was attained notwithstanding that:

- a) At all times 80% or more of the common stock was closely held by the Rojtmans, the Elliotts, their families, friends and associates and the Continental group.
- b) At all times ATC was in a precarious financial condition.
- c) ATC never paid a dividend on its common stock and in fact could not pay a dividend under the terms of its first mortgage.
- d) ATC book value was about \$1.15.
- e) Prior to 1952 and for the years 1948-1951 inclusive ATC had an earned surplus of only \$49,542.
- f) ATC had net losses of \$39,908 in 1952, \$88,814 in the eight months ended August 31, 1953 and \$166,871 in the fiscal year ended August 31, 1954, and

net profits of \$346,782 in fiscal 1955 and \$306,211 in the eleven months ending July 31, 1956. Thus, in its best year (fiscal 1955), earnings were about 32 cents per share.

[fol. 360] 34. The foregoing facts and circumstances tend to show that from July 1954 until the merger with Case the stock market price of ATC was not achieved in a free and open market. Further, they tend to show that defendants Rojzman, Lillian Rojzman, Elliott, Ellen B. Elliott, James Gilligan, the Elliott Group, the Continental Motors group and the Gilligan, Will group knew that the market price of ATC common, was not achieved in a free and open market.

35. In the negotiations that eventuated in the merger between Case and ATC, Rojzman and Elliott, the ATC representatives, pressed for terms that would give full recognition to the market price of ATC common stock. It was a floor from which the ATC negotiators would not budge and from which the Case negotiators allegedly could not move. The Case directors relied on the stock market price of ATC in concluding that the terms offered to them were the best available and in determining the value of the consideration received for the issuance of Case stock.

36. The President's letter to the stockholders of J. I. Case, attached to the Case Proxy Statement, specifically refers to the stock market price of ATC in attempting to set forth to the Case shareholders the price Case was paying for ATC. The Case shareholders were led to rely upon and did rely upon the market price of ATC stock in determining to vote for the merger.

37. By reason of the unjustified price of ATC common and the Case-ATC merger the persons who received the 170,000 ATC penny warrants including Elliott and his wife Ellen B. Elliott, converted a total investment of \$86,700 from an unrealizable paper profit to \$4,333,300 into a realizable profit of that amount. Similarly, the Rojzmans, who had invested in ATC less than \$100,000 initially, converted an unrealizable proper profit of approximately \$5,900,000 into a realizable profit of that amount.

38. The Case management group knew or in the exercise of ordinary care should have known, and the other Case directors in the exercise of ordinary care should have known the foregoing facts which tend to show that the market price of ATC common stock was not achieved in a free and open market.

[fol. 361]

V. False and Misleading Representations In and Material Omissions from the Proxy Statement:

39. The directors of Case violated their fiduciary obligations to the Case common shareholders by permitting the issuance to such shareholders of Brown's letter of October 15, 1956 and the Proxy Statement of October 15, 1956. These documents contained numerous material omissions, false representations and misleading statements which, among others, include the following:

a) Brown's letter and the Proxy Statement fail to state expressly the total price Case paid for ATC. The price exceeded \$17,000,000 computed as follows:

553,852 shares Case common at market	\$ 7,961,623.
1,107,704 shares Case 2nd preferred at par value	7,753,928
Cash to redeem outstanding ATC preferred (other than that held by Case).	1,312,500
Total	\$17,028,051

b) The proxy statement, moreover, gives the false impression (p. 40) that the price being paid is the "minimum fair value" of the net assets of ATC as fixed by the directors, namely, \$14,757,068.

c) The letter and statement fail to state that the book value of Case common was \$36.00 per share and ATC common \$1.15. The letter states that the net book worth of ATC adjusted to reflect the subsequent issue of 50,000

shares of ATC preferred to Case was \$3,525,653, but fails to state explicitly that prior thereto ATC net book worth was only \$2,525,653. The effect of this omission was to inflate the apparent value of ATC and reduce the disparity between the price paid by Case and the book value of the assets to be received.

d) The proxy statement which displays prominently on page 7 the comparative market prices of Case and ATC common stocks led the Case shareholders to infer that the proposed terms of merger were fair because in accordance with the comparative market price of the two stocks.

e) The letter and proxy statement fail to state that the \$1,000,000 investment in ATC by Case was necessary to maintain ATC as a going concern until the merger would be consummated, and that after approval of the merger Case would have to invest additional millions of dollars for [fol. 362] working capital in order to continue operating ATC.

f) The prospectus states falsely (page 2) that the Case common "would not be affected" as a result of the merger, whereas in fact the Case common was affected substantially and adversely in the following particulars: The 1,107,704 shares of the new \$7.00, 6½% preferred have a prior claim on earnings totaling about \$500,000 per year. Until the earnings of ATC assets exceed \$500,000 there will be no benefit whatever to the old Case common shareholders. In addition, there will be charges against earnings averaging about \$680,000 per year for approximately 20 years for amortizing the \$13,463,000 difference between the price of the ATC assets and their book value. This charge will be borne principally by the former Case shareholders.

The letter and statement fail to state explicitly that after the \$500,000 and \$680,000 have been charged to earnings, the Case shareholder group as constituted before the merger must share the remaining earnings with the holders of the 553,852 shares of Case issued to the holders of the ATC common.

g) The statement that the Case common will not be "adversely affected" is false for the further reason that

no statement was made apprising the Case shareholders that control of the Case Company was being placed in the hands of Rojzman, Elliott, the Elliott group and the Continental group.

The passing of control of Case to these persons was further concealed by a misstatement in the proxy statement that Ellen B. Elliott held only 5000 shares of ATC preferred when, in fact she also held 90,000 shares of ATC common.

h) While the letter and proxy statement overstate facts favorable to ATC, they tend to make the position of Case appear worse than it was in actuality. In particular, for ATC the prospectus sets forth the earned surplus account for the years from 1952 to a current date in 1956 (page 32). On page 26, however, similar information is presented with reference to Case for the period from 1953 to 1956. This fact is significant because in 1952 Case experienced a good year in which sales exceeded \$153,000,000, net income exceeded \$7,000,000 and earnings per share were \$2.82, a sum more than double the book value of ATC common [fol. 363] mon. Moreover, on page 26 of the proxy statement the net loss of Case for the nine months ended July 31, 1956 is stated to be \$3,703,389. On the basis of this information the reader of the proxy statement would infer that the loss for the 1956 fiscal year would be approximately \$5,000,000. In fact, however, the loss for 1956, was \$987,000, an amount far less than the loss stated for the nine-month period. Since the letter and the prospectus were dated October 15, 1956, only two weeks short of the close of the 1956 fiscal year, the directors knew or should have known that the nine months' results gave a false picture of fiscal 1956.

i) The proxy statement fails to state that the recipients of the stock options were the persons who had negotiated the terms of the merger which included the stock options.

j) The proxy statement fails to reveal that Grede Foundries Inc., which is owned and controlled by William J. Grede, was a supplier of castings to Case and ATC.

k) The letter and proxy statement misstate that ATC was a then producer of medium size crawler tractors and

that Case would gain an immediate entry into the road-building and heavy construction equipment business if the merger were approved.

l) The proxy statement misrepresents ATC's current and prospective competitive situation.

m) The letter and proxy statement misstate that Case and ATC branches, dealers and distributors would be capable of handling the merged line of equipment.

40. These omissions, false representations and misleading statements in the letter and proxy statement were material to the merits of the merger proposal. The shareholders of Case relied thereon in voting on the merger. In view of the close margin by which the merger was approved, it would not have been approved if the letter and proxy statement had not contained such omissions, false representations and misleading statements.

VI. Concluding Allegations

41. Plaintiff and other holders of common stock of Case similarly situated to plaintiff have been severely and irreparably damaged by the plan of merger herein described and have no adequate remedy at law.

[fol. 364] Wherefore, plaintiff prays that this Court:

I. Declare and adjudge that the plan of merger is illegal and void and any action taken pursuant thereto is illegal and void.

II. Grant such of the following relief as it deems equitable.

a) Enter judgment in favor of the plaintiff and all other Case shareholders similarly situated and against the Case directors who approved the merger, Rojzman, Elliott and such of the other defendants as the Court finds responsible for the merger for \$12,000,000; or

b) Enter a decree setting aside the merger and:

1) Ordering Case to establish a corporation under the laws of the State of New York bearing the name American

Tractor Corporation, or a similar name, having an authorized capital stock, charter and by-laws substantially similar to those of ATC on January 10, 1957 and thereupon transfer to such new corporation such assets and cause such new corporation to assume such liabilities as this Court deems equitable.

2) Ordering Case to direct all holders of shares received as a result of the merger, and their successors in interest, to surrender such shares to Case together with all dividends received thereon.

3) Ordering Case to issue to the persons described in (2) above one share of the common stock of such new corporation for each $\frac{1}{2}$ share of Case common and each share of Case second preferred surrendered by them.

4) Ordering Case to cause the new corporation to issue to the holders of the 50,000 ATC warrants outstanding new warrants of the new New York Corporation with substantially the same conversion rights; and

5) Determining the damages suffered by Case as a result of the attempted merger and for judgment in favor of the plaintiff and all other shareholders similarly situated and against Rojzman, Elliott, the directors of Case who approved the merger and such of the other defendants as the Court finds responsible for the merger for the amount thereof; or

c) Enter a decree:

[fol. 365] 1) Determining the fair market value of the net assets of ATC acquired by Case.

2) Directing the ATC common shareholders who received Case stock as a result of the merger or their transferees to surrender to Case for cancellation such portion of the Case common and second preferred received by them, as the court shall deem equitable or

d) Enter a decree:

1) Determining the fair market value of the ATC net assets acquired by Case.

2) Directing Case to issue to plaintiff and all other Case shareholders similarly situated such securities of Case as

the Court shall deem necessary to make fair and equitable the relative interests of such shareholders and shareholders who acquired Case securities in the merger.

III. Declare and adjudge that the stock options granted to Grede, Brown, and Rojzman are illegal and void and ordering that said options be cancelled.

IV. Declare and adjudge that the common stock purchase warrants issued to the purchasers of ATC preferred, Series 56-1 may not be exercised for the purchase of Case securities as provided in the merger plan and cancel such warrants.

V. Grant such other and further relief, including allowances to plaintiff for his costs, disbursements and counsel fees, as equity shall require.

Alex Elson, Arnold I. Shure and Bruno V. Bitker,
Alex Elson, one of the attorneys for plaintiff.

Alex Elson, 11 South La Salle Street, Chicago 3, Illinois;
Arnold I. Shure, 11 South La Salle Street, Chicago 3,
Illinois;

Bruno V. Bitker, 208 E. Wisconsin Ave., Milwaukee,
Wisconsin,

Attorneys for Plaintiff.

[fol. 366]: *Duly sworn to by Carl H. Borak, jurat omitted in printing.*

[fol. 367]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 56 C 247

[Title omitted]

**MOTION FOR ORDER DIRECTING CERTAIN DEFENDANTS TO
APPEAR OR PLEAD—Filed April 2, 1958**

Now Comes plaintiff by Bruno V. Bitker, Alex Elson and Arnold I. Shure, his attorneys, and state that the above action is a suit to enforce a claim to, or to remove an encumbrance, lien or cloud upon title to certain shares of stock and certain warrants to purchase shares of stock of the defendant, J. I. Case Company, a Wisconsin corporation, all as more fully appears in the Amended and Supplemental Complaint filed April 1, 1958. All of said property is situated in the district where this suit is brought. Defendants A. O. Choate, William Ewing, H. S. Sturgis, Allen Northey Jones, Edward L. Elliott, Ellen B. Elliott, Mentor Kraus, C. J. Reese, C. W. Johnson, Earl Ginn, H. W. Vandeven, John W. Mulford, Joan M. Dixon, Elliott and Company, a partnership, Mary E. Elliott, John B. Elliott, Edward A. Walsh, Edna Walsh, Richard Pistell, Janet Pistell, Gilligan [fol. 368] Will and Company, a partnership, James Gilligan, William Will, Louis W. Alter, Veronica Gilligan, R. Howe, L. E. Howard, E. Kalik and Nathaniel C. Beeber are not inhabitants of this district and have not voluntarily appeared herein. The states of residence of the above listed defendants and the addresses where they may be found are as set forth below:

<i>Name of Defendant</i>	<i>State of Residence</i>	<i>Address Where Defendant May Be Found</i>
A. O. Choate	New York	Clark, Dodge & Co. New York City, N.Y.
William Ewing	New York	Morgan Stanley & Co. New York City, N.Y.

<i>Name of Defendant</i>	<i>State of Residence</i>	<i>Address Where Defendant May Be Found</i>
H. S. Sturgis	New York	Sanderson & Porter New York City, N.Y.
Allen Northey Jones	New York	Morgan Stanley & Co. New York City, N.Y.
Edward L. Elliott	New Jersey	Elliott & Company 25 Broad Street New York City, N.Y.
Ellen B. Elliott	New Jersey	30 West Road Short Hills, N. J.
Mentor Kraus	Indiana	Third Floor, Utility Bldg. Ft. Wayne, Ind.
C. J. Reese	Michigan	Continental Motors Corp. 620 Ford Bldg. Detroit, Michigan
C. W. Johnson	Michigan	1516 Carleton St. Whitehall, Michigan
Earl Ginn	Michigan	1621 Moulton No. Muskegon, Michigan
H. W. Vandeven	Michigan	164 Washington Muskegon, Michigan
John W. Mulford	Michigan	Gray Marine Motor Co. 710 Canton Ave. Detroit, Michigan
Joan M. Dixon	Michigan	c/o John W. Mulford Gray Marine Motor Co. 710 Canton Ave. Detroit, Michigan
[fol. 369] Mary E. Elliott	New Jersey	30 West Road Short Hills, N. J.

<i>Name of Defendant</i>	<i>State of Residence</i>	<i>Address Where Defendant May Be Found</i>
John B. Elliott	New Jersey	Elliott & Co. 25 Broad St. New York City, N.Y.
Elliott and Company	New York	25 Broad St. New York City, N.Y.
Edward A. Walsh	New York	Elliott & Co. 25 Broad St. New York City, N.Y.
Edna Walsh	New York	c/o Edward A. Walsh, 25 Broad St. New York City, N.Y.
Richard Pistell	New York	Elliott & Co. 25 Broad St. New York City, N.Y.
Janet Pistell	New York	c/o Richard Pistell 25 Broad St. New York City, N.Y.
Gilligan Will & Company	New York	Gilligan Will & Company 123 Greenwich St. New York City, N.Y.
James Gilligan	New York	Gilligan Will & Company 123 Greenwich St. New York City, N.Y.
William Will	New York	Gilligan Will & Company 123 Greenwich St. New York City, N.Y.
Louis W. Alter	New York	Gilligan Will & Company 123 Greenwich St. New York City, N.Y.

<i>Name of Defendant</i>	<i>State of Residence</i>	<i>Address Where Defendant May Be Found</i>
Veronica Gilligan	New Jersey	86 Hillside Ave. Caldwell, N.J.
R. Howe	New York	Gilligan Will & Company 123 Greenwich St. New York City, N.Y.
L. E. Howard	New York	Gilligan Will & Company 123 Greenwich St. New York City, N.Y.
E. Kalik	New York	Gilligan Will & Company 123 Greenwich St. New York City, N.Y.
Nathaniel C. Beeber	New York	74 Trinity Place New York City, N.Y.

[fol. 370] Wherefore plaintiff moves for an order directing said defendants to appear and plead or answer in said cause by a day certain to be designated by this court and directing that said order be served upon the said defendants, together with a copy of the Amended and Supplemental Complaint, wherever found pursuant to Section 1655 of the Judicial Code, 28 U.S.C. § 1655.

Bruno V. Bitker, One of the attorneys for plaintiff.

Duly sworn to by Bruno V. Bitker, jurat omitted in printing.

[fol. 371]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 56 C 247

[Title omitted]

ORDER DIRECTING CERTAIN DEFENDANTS TO APPEAR OR PLEAD
—April 2, 1958

This Matter Coming on to Be Heard on the Motion of plaintiff by his attorneys Bruno V. Bitker, Alex Elson and Arnold I. Shure and it appearing that this action is a suit to enforce a claim to, or to remove an encumbrance, lien or cloud upon title to certain shares of stock and certain warrants to purchase shares of stock of the defendant J. I. Case Company, a Wisconsin corporation, all of which property is situated in this district and it appearing that defendants A. O. Choate, William Ewing, H. S. Sturgis, Allen Northey Jones, Edward L. Elliott, Ellen B. Elliott, Mentor Kraus, C. J. Reese, C. W. Johnson, Earl Ginn, H. W. Vandeven, John W. Mulford, Joan M. Dixon, Elliott and Company, a partnership, Mary E. Elliott, John B. Elliott, Edward A. Walsh, Edna Walsh, Richard Pistell, Janet Pistell, Gilligan Will and Company, a partnership, James Gilligan, William Will, Louis W. Alter, Veronica Gilligan, R. Howe, L. E. Howard, E. Kalik and Nathaniel C. Beeber are not residents of and cannot be found within this district and that they [fol. 372] have not voluntarily appeared in this action,

It Is Hereby Ordered that each of the foregoing defendants appear and plead or answer to the Amended and Supplemental Complaint on or before June 1, 1958 and that in default thereof the Court proceed to hearing and adjudication of this suit in the same manner as if the said defendants had been served with process within this district.

It Is Further Ordered that a certified copy of this order and a copy of plaintiff's Amended and Supplemental Complaint be served upon each of the said defendants within twenty-five days before the date above named by the re-

spective United States Marshals for the respective districts in which said defendants are residents or may be found.

Enter April 2, 1958

Robert E. Tehan, Judge of the United States District Court for the Eastern District of Wisconsin.

[fol. 536]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 56-C-247

[Title omitted]

ORDER ON MOTION FOR SECURITY—October 23, 1958

This case having come on for hearing on April 28, 1958 and on October 13, 1958, on motion of the defendant, J. I. Case Company, for an order (1) requiring plaintiff herein to give defendant, J. I. Case Company security for costs in the sum of \$1,000,000 pursuant to Section 180.405(4) Wisconsin Statutes, and (2) pending deposit of such security, staying all further proceedings on behalf of the plaintiff, and (3) directing that, if plaintiff should fail to give security within the time and in the manner directed, the Clerk of Court upon proof by affidavit by defendant, J. I. Case Company, that the plaintiff has failed to file the security within the time and in the manner provided shall enter judgment dismissing the action as to all defendants with costs, and briefs having been filed in connection with said motion, and the Court having heard oral argument and considered the briefs and being fully advised,

Now, Therefore, It Is Hereby Ordered:

1. That the plaintiff be and he is hereby directed to furnish the defendant, J. I. Case Company, on or before December 12, 1958, with security for reasonable expenses, pursuant to Section 180.405(4) Wisconsin Statutes, including attorneys' fees, in the form of a surety bond of

a company duly licensed to write such bonds in the State of Wisconsin in the amount of \$75,000, or cash in said amount, securing the defendant, J. I. Case Company, for its reasonable expenses, including attorneys' fees, in this action for which it may become liable by reason of the provisions of Section 180.407 Wisconsin Statutes, or,

2. That if the plaintiff fails to furnish security within the time and in the amount and manner provided in Item 1, judgment dismissing the action as to all defendants will be entered with costs.

3. That nothing herein contained shall be construed so as to prevent the plaintiff from seeking leave to file an amendment to his amended and supplemental complaint joining as additional parties plaintiff the holder or holders of at least 3% of the common stock of J. I. Case Company prior to December 12, 1958.

4. That the defendant, J. I. Case Company, will permit counsel for the plaintiff to examine its shareholder list of March 19, 1958, and any shareholder list prepared subsequent to that date as soon as it is available, at the offices of Robertson, Hoebreckx and Davis, Suite 720 Wells Building, 324 East Wisconsin Avenue, Milwaukee 2, Wisconsin, for the purpose of enabling plaintiff's counsel to ascertain which, if any, of the shareholders contained in such list were also shareholders of record of J. I. Case Company on October 16, 1956.

5. That the time for any defendant to answer or make a motion directed toward the amended and supplemental complaint be and the same is hereby extended to 20 days after the receipt of notice of the filing of security as provided in Item 1, or to 20 days after the service of an amended complaint as provided in Item 3, if a motion for leave to file such amended complaint be granted.

Dated, Milwaukee, Wisconsin, this 23rd day of October, 1958.

Robert E. Tehan, U. S. District Judge.

[fol. 554]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
No. 56-C-247

CARL H. BORAK, Plaintiff,

vs.

J. I. CASE COMPANY, a Wisconsin corporation,
et al., Defendants.

OPINION—September 17, 1959

On April 7, 1958, the defendants filed a motion in this action for an order requiring the plaintiff to give security for expenses pursuant to the provisions of §180.405(4), Wisconsin Statutes. The court entered its order on October 23, 1958 directing the plaintiff to furnish security on or before December 12, 1958, in the amount of \$75,000 for reasonable expenses incurred by the defendant, J. I. Case Company, or for which said defendant would become liable. The order further provided that if the plaintiff failed to furnish security as directed, judgment dismissing the action as to all defendants would be entered with costs. The order further expressly provided,

"That nothing herein contained shall be construed so as to prevent the plaintiff from seeking leave to file an amendment to his amended and supplemental complaint joining as additional parties plaintiff the holder or holders of at least 3% of the common stock of J. I. Case Company prior to December 12, 1958."

The plaintiff has filed a motion for rehearing asking the court to vacate the order of October 23, 1958, and to stay dismissal of this action until twenty days after the ruling on the motion for rehearing. The plaintiff further asks that, should the motion for rehearing be denied, the dis-

missal order be conditioned on payment by defendants to plaintiff of the costs and expenses incurred by him.

[fol. 555] The defendant, J. I. Case Company, has filed a motion for judgment dismissing this action because of failure by the plaintiff to comply with the order of October 23, 1958.

The plaintiff contends that defendants' motion for security for costs should be denied because (1) defendants are precluded from asserting their rights under §180.405 (4), Wisconsin Statutes, by reason of waiver and laches, (2) the amended complaint sets forth a representative cause of action to which the security for costs statute is inapplicable, and, (3) §180.405(4), Wisconsin Statutes, under which defendants claim the right to security violates the United States Constitution.

We have carefully examined the record in this case and find no merit to the plaintiff's contention that the defendants have waived their right to security or are guilty of laches with respect to asserting the right.

Plaintiff's original complaint, in which he asked the court to declare that the then proposed plan of merger between J. I. Case Company and American Tractor Corporation was illegal and void and sought to enjoin the defendants therein named from taking action to consummate said plan, was filed on November 13, 1956. On November 15, 1956, the court denied the plaintiff's motion for a temporary injunction.

Shortly thereafter, this court held the first of many pre-trial conferences calculated to expedite the discovery procedure and shape the issues for trial. It was the position of the plaintiff that extensive discovery proceedings were necessary before he could file his amended complaint. The court sustained plaintiff in this respect over the objection of the defendants, and agreed to monitor the discovery proceedings. The court was called on very frequently to rule on motions for the production of a vast [fol. 556] amount of documents. After some months of inspection and study of these documents, the taking of depositions began. According to plaintiff's counsel on supporting affidavit, a total of 3730 pages of depositions were taken of some 34 witnesses in Milwaukee, Chicago, Racine,

and New York, between June 11, 1957 and February 27, 1958.

Thereafter, it appears that counsel for plaintiff drafted his amended complaint, which was filed on April 1, 1958. Within six days thereafter, the defendants filed their motion for security for costs. Under these circumstances, we must find that the defendants were not only not guilty of laches, but were most vigilant and alert in asserting their defenses.

It is difficult to accept plaintiff's contention in this respect. He himself was given an extremely generous amount of time to complete his pre-pleading discovery, and then time to file his amended complaint. We know of no method by which an adversary can intelligently address a motion to a pleading before it is in existence.

Plaintiff's second ground of his motion is that he and the other common stockholders of J. I. Case Company have preemptive rights with respect to the shares issued for the acquisition of American Tractor Corporation. We find nothing in the briefs filed subsequent to the rendition of our oral opinion to cause us to change the views we expressed therein, and we therefore adhere to it.

At the hearing on the defendants' motion for security, and in his briefs filed in opposition to said motion, the plaintiff raised no question concerning the constitutionality of §180.405(4), Wisconsin Statutes, but he now asserts that that section contravenes the Due Process and Equal Protection Clauses of the United States Constitution. This [fol. 557] same contention was considered by the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp., et al.* (1949) 337 U. S. 541; in which case the Supreme Court held that a similar statute in effect in the State of New Jersey was constitutional. The plaintiff attempts to distinguish the *Cohen* case because the New Jersey statute there upheld required a shareholder to own 5% of the stock or stock having a market value of \$50,000, while the Wisconsin Statute requires a shareholder to own 3% of the stock regardless of its market value. We do not believe that his variance between the New Jersey and Wisconsin Statutes is significant on the question of constitutionality. The Supreme Court's opinion in the *Cohen*

case makes clear that Court's belief that a state has plenary power to impose standards of responsibility and accountability upon stockholders seeking to represent the interests of fellow stockholders in court actions as conditions precedent to placing the state's litigating and adjudicating processes at their disposal. Nor is there any indication in the opinion that a state is restricted to imposing a monetary standard only. On the contrary, the opinion at Pages 552-553 states:

"We do not think the state is forbidden to use the amount of one's financial interest, which measures his individual injury from the misconduct to be redressed, as some measure of the good faith and responsibility of one who seeks at his own election to act as custodian of the interests of all stockholders, and as an indication he volunteers for the large burdens of the litigation from a real sense of grievance and is not putting forward a claim to capitalize personally on its harassment value. These may not be the best ways of precluding 'strike lawsuits,' but we are unable to say that a classification for these purposes, based upon the percentage or market value of the stock alleged to be injured by the wrongs, is an unconstitutional one. Where any classification is based on a percentage or an amount, it is necessarily somewhat arbitrary."

The plaintiff's motion for rehearing asking the court to vacate its order of October 23, 1958, to stay dismissal of this action until 20 days after the ruling on this motion, and to condition the dismissal order on payment by the [fol. 558] defendants to the plaintiff of his costs and expenses is in all respects denied in accordance with this opinion, and the motion of the defendant, J. I. Case Company, for judgment dismissing this action as to all defendants is granted.

Dated, Milwaukee, Wisconsin, this 17th day of September, 1959.

Robert E. Tehan, U. S. District Judge.

[fol. 559]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 56-C-247

[Title omitted]

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING AND
GRANTING DEFENDANTS' MOTION FOR JUDGMENT DISMISS-
ING THE ACTION—September 17, 1959

This court on October 23, 1958 having granted the defendants' motion to require security for costs pursuant to §180.405(4), Wisconsin Statutes, and having ordered that the plaintiff furnish the defendants with such security for reasonable expenses in the amount of \$75,000 on or before December 12, 1958, and that, if the plaintiff failed to furnish such security within the time provided, judgment dismissing the action as to all defendants would be entered with costs, and the plaintiff having filed its motion for rehearing on December 2, 1958, asking that the court (1) vacate its order of October 23, 1958, (2) stay dismissal of this action until 20 days after the ruling on this motion, and (3) if this motion is denied, condition its dismissal order upon payment by the defendants to the plaintiff of his costs and expenses, and the defendant, J. I. Case Company, having moved on December 16, 1958, for judgment dismissing this action as to all defendants with costs, and the court having considered the briefs and affidavits filed in connection with said motions, and having this day filed its opinion,

[fol. 560] Now, Therefore, It Is Ordered:

1. That the motion of the plaintiff filed on December 2, 1958, be and the same is hereby in all respects denied.
2. The motion of the defendant, J. I. Case Company, be and the same is hereby granted and the action is dismissed.

Dated, Milwaukee, Wisconsin, this 17th day of September, 1959.

Robert E. Tehan, U. S. District Judge.

[fol. 606]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
No. 56-C-247

CARL H. BORAK, Plaintiff,

vs.

J. I. CASE COMPANY, a Wisconsin corporation,
et al., Defendants.

ORDER VACATING ORDER OF DISMISSAL, ETC.—March 10, 1960

The plaintiff having filed a notice of appeal on October 16, 1959, from orders of the court granting the defendants' motion to require security for costs, denying the plaintiff's motion for a rehearing and granting the defendant, J. I. Case Company's motion to dismiss this action as to all defendants, and the plaintiff having subsequently moved to dismiss his appeal, which motion was granted, and having moved (1) for leave to file a second amended and supplemental complaint; (2) to dismiss Lillian Rojzman, Ellen B. Elliott, Herbert H. Bloom, Allen Northey Jones, C. J. Reese, C. W. Johnson, Earl Ginn, Wesley Todd, H. W. Vandeven, John W. Mulford, Joan M. Dixon, Elliott & Company, a partnership, John B. Elliott, Mary E. Elliott, Edward A. Walsh, Edna Walsh, Richard Pistell, Janet Pistell, Gilligan Will & Company, a partnership, James Gilligan, William Will, Louis W. Alter, Veronica Gilligan, R. Howe, L. E. Howard and E. Kalik, as defendants; and (3) to vacate the order of dismissal entered September 17, 1959, or modify said order by permitting the filing of the second amended and supplemental complaint, and briefs having been filed by the plaintiff and by the defendant, J. I. Case Company in connection with said motion, and a hearing on said motion having been held, and the court having considered the briefs filed and the arguments of counsel, and being fully advised,

[fol. 607] Now, Therefore, It Is Ordered:

1. That the order of dismissal entered September 17, 1959, be and the same is hereby vacated and set aside.

2. That the plaintiff is hereby granted leave to dismiss Lillian Rojzman, Ellen B. Elliott, Herbert H. Bloom, Allen Northey Jones, C. J. Reese, C. W. Johnson, Earl Ginn, Wesley Todd, H. W. Vandeven, John W. Mulford, Joan M. Dixon, Elliott & Company, a partnership, John B. Elliott, Mary E. Elliott, Edward A. Walsh, Edna Walsh, Richard Pistell, Janet Pistell, Gilligan Will & Company, a partnership, James Gilligan, William Will, Louis W. Alter, Veronica Gilligan, R. Howe, L. E. Howard and E. Kalik, as defendants.

3. That the plaintiff be and he is hereby granted leave to file a second amended and supplemental complaint.

Dated, Milwaukee, Wisconsin, this 10th day of March, 1960.

Robert E. Tehan, U. S. District Judge.

[fol. 623]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 56 C 247

[Title omitted]

ORDER DISMISSING CERTAIN DEFENDANTS—Filed June 20, 1960

This Matter Coming on to Be Heard on the motion of plaintiff, and leave of Court having been previously granted,

It Is Hereby Ordered that the following persons be and they are hereby dismissed as defendants in this action:

Lillian Rojzman, Ellen B. Elliott, Herbert H. Bloom, Allen Northey Jones, C. J. Reese, C. W. Johnson, Earl

Ginn, Wesley Todd, H. W. Vandeven, John W. Mulford, Joan M. Dixon, Elliott & Company, a partnership, John B. Elliott, Mary E. Elliott, Edward A. Walsh, Edna Walsh, Richard Pistell, Janet Pistell, Gilligan Will & Company, a partnership, James Gilligan, William Will, Louis W. Alter, Veronica Gilligan, R. Howe, L. E. Howard and E. Kalik.

Dated:

Enter:

Robert E. Tehan, U. S. District Judge.

[fol. 625]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 56 C 247

[Title omitted]

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT—

Filed July 1, 1960

(Dated June 29, 1960)

Carl H. Borak, plaintiff, by his attorneys, Bruno V. Bitker, Alex Elson and Arnold I. Shure, alleges upon information and belief, except as to paragraphs 1 and 2 which are alleged on personal knowledge, as follows:

1. Plaintiff Carl H. Borak, at all times herein mentioned, was and now is a resident and citizen of the State of Illinois. He is, and at the time of the matters complained of herein was, the registered and beneficial owner of 2000 shares of common stock of J. I. Case Company, ("Case"). Five Hundred shares were purchased in 1952 which became 1000 shares in a subsequent 2 for 1 stock split and 1000 shares in 1955.

[fol. 626] 2. Plaintiff brings this action in a representative capacity on behalf of himself and all other holders of common stock immediately prior to the merger hereafter

described, and their successors in interest, excluding all holders of common stock who were directors of Case just prior to the merger and such holders of common stock who were apprised of the acts and wrongdoing hereafter described, the total holdings of which shareholders are in excess of 200,000 shares. The shareholders whom plaintiff represents constitute a class in excess of 4,000 persons and are so numerous it is impractical for all to join as plaintiffs. Plaintiff is well able to represent such common stockholders fairly and effectively.

3. Defendant Case, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, is a resident of and doing business in that state and has its principal office in that state.

4. The other defendants and their states of residence are as follows:

	Director From To	Other position Held with Case	Citizen Of
L. R. Clausen	1924 -	Consultant and former President	Wisconsin
John T. Brown	1947 -	Chairman of Board of Directors and formerly President	Wisconsin
H. G. Barr	1952 -	Vice President	Wisconsin
William J. Grede	1953 -	Chairman of Executive Committee, President since 1960	Wisconsin
William B. Peters	1955 -	Vice President and Treas.	Wisconsin
Marc B. Rojzman	1957 - 1960	Formerly President, Executive Vice President and General Manager	Wisconsin
A. O. Choate	1914 - 1957		New York
William Ewing	1920 -		New York
H. S. Sturgis	1927 -		New York
E. P. Hamilton	1953 -		Wisconsin
Mentor Kraus	1957 -		Indiana
Nathaniel C. Beeber	—		New York

[fol. 627] Edward L. Elliott was a director of Case from 1957 until 1959. He died on or about October 15, 1959. By leave of Court, the executor of his estate, John B. Elliott, was substituted as defendant for him. John B. Elliott is a citizen of New Jersey.

A majority of the directors of Case are named as defendants. All defendants who are now Case directors are sued individually and in their capacities as such directors.

Marc B. Rojzman ("Rojzman") is sued individually and as representative of all ATC shareholders who received Case common and second preferred stock in consequence of the Case-ATC merger. Such shareholders constitute a class so numerous as to make it impracticable to bring them all before the Court. All such shareholders are made parties as a class for the purpose of securing certain relief herein requested against this class. The interests of all members of such class are fairly and adequately represented by Rojzman. Nathaniel C. Beeber is sued individually and as a representative of all holders of common stock purchase warrants issued by ATC to the purchasers of its preferred stock, Series 56-1. Such holders constitute a class so numerous it is impracticable to bring them all before the Court. All such holders are made a class for the purpose of securing certain relief herein requested against this class. The interests of all members of the class are fairly and adequately represented by Beeber. All defendants are citizens and residents of states other than Illinois.

5. Jurisdiction is conferred on this court by: (1) Section 1332 of the Judicial Code (28 U.S.C. § 1332) in that there is diversity of citizenship between the plaintiff and all defendants and in that the sum of value in controversy, exclusive of interests and costs, exceeds \$10,000; (2) Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78 aa); (3) Section 1331 of the Judicial Code (28 U.S.C. § 1331) in that the matter in controversy exceeds the sum or value of \$10,000 and arises under the laws of the United States; and (4) Section 1337 of the Judicial Code (28 U.S.C. § 1337) in that the action arises under an Act of Congress regulating commerce.

6. This action is not a collusive one instituted for the purpose of conferring upon a court of the United States

jurisdiction of a cause of action over which it would not otherwise have cognizance.

7. Under the common law of Wisconsin shareholders of Wisconsin corporations have preemptive rights—that is the right to subscribe proportionately to all new or additional issues of corporate securities.

Section 180.21 of the Wisconsin Business Corporation Law provides: "Any preemptive right of a shareholder may be limited or denied to the extent provided in the articles of incorporation."

The Case Articles of Association as amended, contain no provisions regarding denial or limitation of preemptive rights except with regard to a purported attempt to deny the rights in stock set aside under the stock option plan.

Defendants have recognized the existence of the right in relation to stock issued pursuant to stock options (page 20 of the Proxy Statement hereafter described), with respect to all stock issued for cash (Proxy Statement, pp. 18, 19) and with respect to the issuance of \$20,130,400 subordinated debentures on October 15, 1958 (Prospectus, dated October 15, 1958, pages 1, 3 and 20).

8. Plaintiff brings this action to enforce the preemptive rights of himself and other holders of common stock similarly situated to him with respect to certain shares of common and second preferred stock (hereafter described) which [fol. 629] were issued pursuant to a purported statutory merger between Case and ATC, formerly a New York corporation. Plaintiff seeks also to enforce preemptive rights with respect to any shares issued for cash pursuant to ATC stock warrants convertible into Case common and second preferred stock and pursuant to a stock option plan, amendments to which were purportedly adopted by Case. Both the merger plan and stock option amendments purportedly were approved by the shareholders of Case at a special meeting held on November 15, 1956. The merger plan, which required the favorable vote of two-thirds of the outstanding common and preferred stock, each voting separately as a class, was declared approved by a close margin. On January 10, 1957, Case and ATC purportedly completed action required under the laws of Wisconsin and New York to consummate the merger. Both the merger and stock

option proposal were formally announced to the shareholders about October 15, 1956 by means of a Proxy Statement which included a letter dated October 15, 1956, from J. T. Brown, President and Chairman of the Board of Directors of Case, a notice of the November 15, 1956 special meeting of stockholders and a proxy statement describing the plan. Also included were the plan of merger, articles of merger and certificate of consolidation. The proxy statement is attached to the original complaint as Exhibit A, and is incorporated herein by reference.

9. Under the terms of the merger and stock option plan 648,852 shares of common stock (including 195,000 shares issuable for cash) and 1,197,704 shares of second preferred stock (including 90,000 shares issuable for cash) were issued or set aside without granting plaintiff and other common shareholders similarly situated to him their preemptive rights to subscribe to said shares.

[fol. 630] Said merger and stock option plans and the consummation thereof were effectuated by a series of illegal and fraudulent acts hereafter described and in consequence thereof the plaintiff and other shareholders similarly situated to him were deprived of their preemptive rights in the shares of common and second preferred stock issued pursuant to the merger and stock option plans.

10. In May, 1954, Edward L. Elliott (hereafter "Elliott") negotiated for ATC a loan of \$250,000 from a New York bank and at the same time formed and headed a syndicate which lent ATC \$250,000. As part of the transaction, Elliott and Company (Elliott's stock brokerage firm) acquired 20,000 shares of ATC common at 51¢ a share and the syndicate 150,000 shares at the same price.

Elliott devised a plan for ATC to avoid registration of the securities under Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, and the issuance of a formal prospectus. Such a prospectus would have revealed ATC's weak condition and impeded the stock promotion plan. Elliott avoided SEC registration through unlawful recourse to the private offering exemption of Section 4 (1) of the Securities Act of 1933, 15 U.S.C. § 77(d).

At or about the same time ATC made a public offering through Elliott and Company of 24,000 shares of ATC

common stock at \$4.125 a share and on August 31, 1954, filed under Regulation A of the Securities Act of 1933 an offering circular which was false, misleading and fraudulent in several material respects. Elliott and Company moreover in violation of regulations of the Securities Act of 1933, sold to the public all of the 24,000 shares prior to the filing or approval of the offering circular.

[fol. 631] Over the counter trading began about July 1954 and on January 17, 1955 ATC common was listed on the American Stock Exchange.

From 1954 until the merger with Case, approximately 80% of the total outstanding stock of ATC was closely held by Rojzman, Elliott and their associates.

Commencing in June 1954 and continuing until the merger of ATC with Case, Elliott conducted a concerted campaign of bringing ATC to the attention of stock brokers, analysts, security investment advisers and anyone else who might help promote ATC stock.

The total outstanding stock in the hands of the public was small. Total trading in ATC was relatively light with the price often changing widely on narrow trading.

11. Beginning in July, 1954 the market price of ATC common enjoyed a spectacular rise. On August 18, 1955 the stock was split 2 for 1. The stock price ranges from the third quarter of 1954 to the third quarter of 1956 were:

	<i>Before Split</i>		<i>After Split and Adjusted for Split</i>	
	<i>High</i>	<i>Low</i>	<i>High</i>	<i>Low</i>
3rd Quarter 1954	5¾*	3**	27/8*	1½**
4th Quarter 1954	12¾*	7**	63/8*	3½**
1st Quarter 1955	19¼	12	95/8	6
2nd Quarter 1955	30	19	15	9½
3rd Quarter 1955			145/8	12¾
4th Quarter 1955			177/8	13
1st Quarter 1956			16¼	133/8
2nd Quarter 1956			14¾	13½
3rd Quarter 1956			15	12½

* High offer over-the-counter

** Low bid over-the-counter

[fol. 632] 12. The foregoing rise in price was attained notwithstanding that:

- a) At all times 80% or more of the common stock was closely held by Rojzman, Elliott and their associates.
- b) At all times ATC was in a precarious financial condition.
- c) ATC never paid a dividend on its common stock and in fact could not pay a dividend under the terms of its first mortgage.
- d) ATC book value was about \$1.15.
- e) Prior to 1952 and for the years 1948-1951 inclusive, ATC had an earned surplus of only \$49,542.
- f) ATC had net losses of \$39,908 in 1952, \$88,814 in the eight months ended August 31, 1953 and \$166,871 in the fiscal year ended August 31, 1954, and net profits of \$246,782 in fiscal 1955 and \$306,211 in the eleven months ending July 31, 1956. Thus, in its best year, (fiscal 1955) earnings were about 32 cents per share.

13. On July 2, 1959 one John A. Latimer was indicted in the United States District Court for the Southern District of New York (Case No. CR 159-188) for manipulating alone and with other persons ATC stock during the period from May, 1955 through February, 1956.

On March 30, 1960 the United States District Court for the Southern District of New York in Case No. CR. 159-188, entitled United States of America v. John A. Latimer, entered the following judgment, the relevant portion of which reads as follows:

[fol. 633] "It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of unlawfully effecting transactions on the American Stock Exchange in the common stock of American Tractor Company. (Title 15, Sections. 78(i)(a)(1), 78(i)(a)(2) and 78ff(a), U.S.C.) as charged in fifty-one counts and the court having asked the defendant whether he has anything to say why judgment should not be pre-

nounced, and no sufficient cause to the contrary being shown or appearing to the court, It Is Adjudged that the defendant is guilty as charged and convicted."

Elliott admitted during the course of his deposition by plaintiff that he knew prior to the merger that Latimer had engaged in manipulative activity in ATC stock.

14. In approving the merger the defendant Case directors violated the Wisconsin Business Corporation Law and breached their fiduciary duties to the plaintiff and other shareholders similarly situated in the following particulars:

(a) The Wisconsin Business Corporation Law provides as follows:

Section 180-14(1):

"Shares having a par value may be issued for such consideration, not less than the par value thereof, as shall be fixed from time to time by the Board of Directors."

Section 180-15(1):

"The consideration for the issuance of shares may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor or services actually performed for the corporation. When payment of the consideration for which shares are to be issued shall have been received by the corporation such shares shall be deemed to be fully paid, and non-assessable by the corporation."

Section 180-15(3):

"In the absence of fraud in the transaction, the judgment of the board of directors or the shareholders, as the case may be, as to the value of the consideration received for shares shall be conclusive."

[fol 634] (b) The directors violated Sec. 180-15(1) in that they included the future earnings of ATC and the future services of Rojzman and other ATC officials as part

of the consideration paid by ATC for the issuance of Case shares. Such future earnings and future services are neither valid consideration nor a proper element of value.

(c) In fixing the consideration for the shares of stock to be issued by Case to ATC for the assets of ATC, the Board of Directors of Case violated Section 180-14(1) in that the consideration fixed was less than the par value of such securities.

The directors of Case fixed what they describe as "the minimum fair value of the net assets of ATC to be acquired in the merger" at \$14,757,068. (Proxy Statement, page 40.) The par value of the Case securities issued was \$14,677,078; determined as follows:

1,107,704 shares of 6½% Second Cumulative Preferred Stock, \$7 par value	\$ 7,753,928
553,852 shares of Common Stock, \$12.50 par value	6,923,150
	<hr/>
	<u>\$14,677,078</u>

As part of the merger agreement Case agreed additionally to redeem the preferred stock of ATC at a cost to Case of \$2,362,500. Of this sum \$1,050,000 was received by Case in redemption of the ATC preferred purchased by it on September 24, 1956 but \$1,312,500 was paid to third parties and hence this sum must be deducted from the \$14,757,068 found to be the minimum fair value of ATC assets. Hence the consideration received for the shares is \$13,444,568 which is \$1,232,510 less than par value.

[fol. 635] (d) In fixing the consideration paid for the shares of Case stock issued to ATC stockholders upon consummation of the merger the directors further violated the requirements of Section 180-14(1) by making a determination of the "minimum fair value" of the assets received from ATC. The directors were under a clear statutory duty to fix the consideration at a specific amount.

(e) The directors of Case did not in fact make the valuation required by Sec. 180-14(1) for the reason that the purported valuation placed on the assets of ATC represented merely a mechanical computation determined to

equal the par value of the stocks which by the terms of the merger agreement Case was obligated to issue to the shareholders of ATC.

(f) The price paid for ATC was excessive in relation to ATC earnings: the purchase price exceeding \$17,000,000 was more than fifty times the earnings for the company's best year, a grossly excessive ratio. On the basis of average earnings of ATC from 1952 to 1956 the purchase price was about 218 times earnings.

(g) In respect to earnings ATC was grossly overvalued and Case grossly undervalued: Case exchanged for each share of ATC stock—average earnings about 7¢, one-half share of Case common (average earnings 40½¢ plus 1 share \$7.00, 6½% second preferred, dividend 45½¢ a total of \$.86). An exchange on this basis was grossly unfair to and a fraud upon the Case common shareholders.

(h) In respect of book value, ATC was grossly overvalued and Case grossly undervalued. The book value of [fol. 636] ATC common stock only was about \$1.15 per share in contrast with a book value of \$36 per share for the common stock of Case. Not considering the inflated value placed on ATC assets, ATC shareholders received about \$20.26 in book value for each of their shares (one-half share Case common, book value after the merger \$13.26 plus one share Case second preferred, par \$7). In total, ATC shareholders received Case common stock having a book value of about \$14,685,799 plus preferred stock paying 6½% dividends, and having a par value of \$7,753,928 or a total of about \$22,400,000 in exchange for shares which had a book value of \$1,275,653. The book value exchange ratio which was in excess of 17 to 1 was grossly unfair to and a fraud upon the Case common shareholders.

(i) The directors wrongfully relied on the market price of ATC common as a measure of value of ATC.

(j) In determining value of part of the physical assets of ATC, the Case directors wrongfully relied on an appraisal of said property by a firm hired by ATC prior to the merger. The appraisal inflated the value of such assets by

more than 100%. Moreover, while the proxy statement says the Case directors relied on this appraisal most of them never saw it and some never heard of it.

(k) The Case directors improperly considered as an element of value the projected future earnings of ATC.

(l) The directors of Case failed to consider that even the \$17,000,000 price would not represent the full cost of ATC to Case. At the time of the merger, ATC was so critically short of cash that it was scarcely a viable entity, and in fact it was necessary for Case to invest \$1,000,000 in ATC before shareholder approval of the merger so that it could survive.

[fol. 637] Thereafter, in October, 1958, it was necessary for Case to borrow \$20,130,400 on subordinated 5½% debentures, and in April, 1959, to borrow \$25,000,000 on 15 year, 5¾% notes. These loans were necessitated in large part by the ATC merger. The interest charges on these loans, exceeding \$2,500,000 per year, constitute a prior claim to earnings ahead of the common stock.

15. The defendant Case directors breached their fiduciary obligations to the Case common shareholders and violated section 14a of the Securities and Exchange Act of 1934 (15 U.S.C. § 78n(a)) and Rule X-14a promulgated thereunder (17 C.F.R. 240.14a), by approving and issuing the Proxy Statement of October 15, 1956 (including Brown's Letter) which contained numerous material omissions, false representations and misleading statements which, among others, include the following:

a) Brown's letter and the Proxy Statement fail to state expressly the total price Case paid for ATC exceeded \$17,000,000.

b) The Proxy Statement, moreover, gives the false impression (p. 40) that the price being paid is the "minimum fair value" of the net assets of ATC as fixed by the directors, namely, \$14,757,068.

c) The letter and statement fail to state that the book value of Case common was \$36.00 per share and ATC common \$1.15. The letter states that the net book worth of ATC

adjusted to reflect the subsequent issue of 50,000 shares of ATC preferred to Case was \$3,525,653, but fails to state explicitly that prior thereto ATC net book worth was only \$2,525,653. The effect of this omission was to inflate the apparent value of ATC and reduce the disparity between the price paid by Case and the book value of the assets to be received.

[[ol. 638] (d) The proxy statement which displays prominently on page 7 the comparative market prices of Case and ATC common stocks led the Case shareholders to infer that the proposed terms of merger were fair because in accordance with the comparative market price of the two stocks.

(e) The letter and proxy statement fail to state that the \$1,000,000 investment in ATC by Case was necessary to maintain ATC as a going concern until the merger would be consummated, and that after approval of the merger Case would have to invest additional millions of dollars for working capital in order to continue operating ATC.

(f) The prospectus states falsely (page 2) that the Case common "would not be affected" as a result of the merger, whereas in fact the Case common was affected substantially and adversely in the following particulars: The 1,107,704 shares of the new \$7.00, 6½% preferred have a prior claim on earnings totaling about \$500,000 per year. In addition, there will be charges against earnings averaging about \$680,000 per year for approximately 20 years for amortizing the \$13,463,000 difference between the price of the ATC assets and their book value. This charge will be borne principally by the former Case common shareholders.

The letter and statement fail to state explicitly that after the \$500,000 and \$680,000 have been charged to earnings, the Case shareholder group as constituted before the merger must share the remaining earnings with the holders of the 553,852 shares of Case issued to the holders of the ATC common.

(g) The statement that the Case common will not be "adversely affected" is false for the further reason that no statement was made apprising the Case shareholders that

control of the Case Company was being placed in the hands of Rojzman, Elliott and those associated with them.

[fol. 639] The passing of control of Case to these persons was further concealed by a misstatement in the proxy statement that Ellen B. Elliott (Wife of Elliott) held only 5,000 shares of ATC preferred when in fact she also held 90,000 shares of ATC common.

(h) While the letter and proxy statement overstate facts favorable to ATC, they tend to make the position of Case appear worse than it was in actuality. In particular, for ATC the prospectus sets forth the earned surplus account for the years from 1952 to a current date in 1956 (page 32). On page 26, however, similar information is presented with reference to Case for the period from 1953 to 1956. This fact is significant because in 1952 Case experienced a good year in which sales exceeded \$153,000,000, net income exceeded \$7,000,000 and earnings per share were \$2.82, a sum more than double the book value of ATC common. Moreover, on page 26 of the proxy statement the net loss of Case for the nine months ended July 31, 1956 is stated to be \$3,703,389. On the basis of this information the reader of the proxy statement would infer that the loss for the 1956 fiscal year would be approximately \$5,000,000. In fact, however, the loss for 1956 was \$987,000, an amount far less than the loss stated for the nine-month period. Since the letter and the prospectus were dated October 15, 1956, only two weeks short of the close of the 1956 fiscal year, the directors knew or should have known that the nine months' results gave a false picture of fiscal 1956.

(i) The proxy statement fails to state that the recipients of the stock options were the persons who had negotiated the terms of the merger which included the stock options.

(j) The proxy statement fails to reveal that Grede Foundries Inc., which is owned and controlled by William J. Grede, was a supplier of castings to Case and ATC and that it would receive a substantial increase in business as a result of the merger.

[fol. 640] (k) The letter and proxy statement misstate that ATC was a then producer of medium size crawler trac-

tors and that Case would gain an immediate entry into the road-building and heavy construction equipment business if the merger were approved.

(l) The proxy statement misrepresents ATC's current and prospective competitive situation.

(m) The letter and proxy statement misstate that Case and ATC branches, dealers and distributors would be capable of handling the merged line of equipment.

(n) The proxy statement fails to state that the Case common shareholders had preemptive rights to the shares of common and second preferred stock issued pursuant to the merger.

(o) The proxy statement fails to state that the stock market price of ATC common stock was inflated, maintained and manipulated.

16. These omissions, false representations and misleading statements in the letter and proxy statement were material to the merits of the merger proposal. The shareholders of Case relied thereon in voting on the merger. The merger was approved by a close margin. It would not have been approved if the letter and proxy statement had not contained such omissions, false representations and misleading statements.

17. The merger and stock option plans were tainted with self dealing by the "Case Management Group" (Brown, Grede and Clark M. Robertson, the latter being a director and general counsel) and the "ATC management group" (Rojtman, Elliott and Kraus). The Case management group promoted the merger in order to perpetuate themselves in office by shifting voting control of Case to Rojtman, [fol. 641] Elliott and their confederates. Rojtman and Elliott promoted the plan in part in order to obtain a market for their large holdings in ATC, the stock market price of which had been inflated, maintained and manipulated by Rojtman and Elliott and their associates.

In arriving at a basis for exchange of stock on the merger the ATC management group insisted upon giving full effect to the current stock market price of ATC stock. The Case

management group and other Case director defendants did give such effect to and relied upon the stock market price of ATC stock.

The stock market price of ATC was inflated, maintained and manipulated by Rojzman, Elliott and their confederates. The Case management knew and the other Case director defendants knew or in the exercise of ordinary care should have known that the market price of ATC was achieved in this illegal and artificial manner.

Brown, Grede and Rojzman were also guilty of self dealing in securing for themselves valuable stock options as one of the terms of the merger.

Grede, who was the prime mover of the merger for Case also was guilty of self dealing in that at the time of the merger his Company, Grede Foundries, Inc., was supplying castings to Case and ATC and after the merger his company received a substantial increase in business. In the fiscal years ending October 31, 1955 and 1956 Grede's combined sales of castings to Case and ATC were approximately \$33,000 and \$88,000, respectively; and after the merger, in fiscal 1957, 1958 and 1959, Grede's total sales to Case were approximately \$435,000, \$674,000 and \$475,000, respectively. Neither Grede nor the other defendants having knowledge of these self dealing transactions revealed this information until plaintiff learned of it in the course of taking the deposition of Grede. Thereafter Case has circumspectly stated this relevant information in its 1958 Debenture prospectus and Annual Proxy Statements to its shareholders.

18. The acts alleged in paragraphs 10-17 inclusive constitute actual or constructive fraud by defendants upon plaintiff and other shareholders similarly situated and such conduct deprived the latter of their preemptive rights.

19. Defendants, by the use of the mails and other instrumentalities of interstate commerce, solicited or permitted the use of their names to solicit proxies by means of the proxy statement dated October 15, 1956 referred to herein, which proxy statement contained materially false and misleading statements and omissions of fact, all as set forth in particular in paragraphs 15-17 hereof, in wilful violation

of Section 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78 n (a) and Rule X-14a, promulgated thereunder, 17 C.F.R. 240.14a.

By reason of the violations of Section 14(a) of the Securities and Exchange Act of 1934 and Rule X-14a promulgated thereunder, as set forth above, the merger and all contracts made pursuant thereto between the defendants are void under section 29(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78 cc (b).

20. If defendants had afforded plaintiff and other shareholders similarly situated to him the right to subscribe to shares issued in the merger on the same basis granted to ATC shareholders, plaintiff and other shareholders similarly situated to him would have been entitled to purchase approximately one-quarter share of Case common and one-half share of second preferred stock for a total subscription price of approximately \$2.20 for each share of Case common held by them at the time of the merger.

[fol. 643] 21. (a) The directors of Case included the future services of Rojzman and other ATC officials as part of the consideration paid by ATC for the issuance of Case shares. In fact, as a pre-condition to the merger the employment of Rojzman was arranged and in consideration thereof he was given an option to purchase 25,000 shares of common stock of Case. (The option period is ten years; the option price the fair market value of the stock on the date the option was granted.) Brown in his letter of October 15, 1956, held out as an inducement to the Case shareholders to approve the merger, the fact that Rojzman would become Executive Vice President and General Manager, a director and a member of the Executive Committee of the Board of Directors immediately after the merger. Subsequently, he became President.

(b) On or about February 1, 1960, Case suddenly announced that Rojzman had resigned as President of Case and that he had resigned as a member of the Board of Directors and Executive Committee. Case further announced that henceforth Rojzman was to be a special adviser to the President and the Case Executive Committee.

He is not to make his headquarters at Racine, the site of Case's principal office, his position is not to be a full time one and he is to be consulted at Case's option. Pursuant to questioning by one of plaintiff's attorneys at the annual meeting of stockholders held on April 21, 1960, Grede revealed for the first time that Rojzman received a three year contract at \$40,000.00 a year for such consulting service. In a printed brochure entitled "Statement of President—Annual Meeting of Stockholders—4-21-60", mailed to Case shareholders subsequent to said meeting, Grede does not mention Rojzman's contract for consulting service.

[fol. 644] (c) Grede succeeded Rojzman as President of Case.

22. Plaintiff and other holders of common stock of Case similarly situated to him have been severely and irreparably damaged by the failure to recognize their preemptive rights. They have no adequate remedy at law.

Wherefore, plaintiff prays that this Court:

I. Grant such of the following relief as it deems equitable:

a) Enter judgment in favor of the plaintiff and all other Case shareholders similarly situated and against the Case directors who approved the merger, Rojzman, Elliott and such of the other defendants as the Court finds responsible for the merger and the consequent deprivation of preemptive rights in an amount to be determined by the Court;

b) Enter a decree directing Case to issue to plaintiff and all other Case shareholders similarly situated and their successors in interest, on such terms as the Court may fix, such securities of Case as the Court deems necessary to compensate them for the violation in the merger of their preemptive rights; or

c) Declare and adjudge that the merger and all agreements made pursuant thereto are void under Section 29(b) of the Securities and Exchange Act of 1934 for violation of Section 14(a) of said Act, or in the alternative, enter judgment for damages growing out of violations of the aforesaid provisions of the Act.

[fol. 645] II. Grant such other and further relief, including allowances to plaintiff for his costs, disbursements and counsel fees, as equity shall require.

Alex Elson, Arnold I. Shure and Bruno V. Bitker,
By: Alex Elson.

Alex Elson, Arnold I. Shure, 11 South LaSalle Street, Chicago 3, Illinois; Bruno V. Bitker, 208 East Wisconsin Avenue, Milwaukee, Wisconsin, Attorneys for Plaintiff.

[fol. 646] *Duly sworn to by Carl H. Borak, jurat omitted in printing.*

[fol. 673-a]

PREFIX

This action was commenced on November 13, 1956 by the plaintiff, Carl H. Borak, suing on behalf of himself and a large class of shareholders situated similarly to him, against J. I. Case Company, a Wisconsin corporation, and John T. Brown, H. G. Barr, L. R. Clausen, William J. Grede, E. P. Hamilton, and William B. Peters, individually and as directors of the corporation, to enjoin and declare illegal and void a merger between the company and American Tractor Corporation. Plaintiff's motion for a temporary injunction was denied on November 15, 1956. Defendants filed their answer to the complaint on November 26, 1956. From November, 1956 through March, 1958 plaintiff engaged in extensive pre-trial discovery which included the taking of voluminous depositions. During this period numerous motions relating thereto were presented to the Court.

On April 1, 1958, plaintiff filed an amended and supplemental complaint and on April 7, 1958 defendants filed a motion for security for expenses under § 180.405(4) of the Wisconsin statutes. A hearing was held on defendants' motion for security on April 28, 1958, after which the Court took the motion under advisement. On October 13, 1958 the Court rendered an oral opinion finding in favor of defendants' motion and on October 23, 1958 en

tered an order directing plaintiff to furnish security for expenses in the amount of \$75,000. On September 17, 1959 the Court denied plaintiff's motion of December 2, 1958 for rehearing and dismissed the action. A written opinion accompanied the order.

On October 16, 1959 plaintiff filed a notice of appeal from the orders dated October 23, 1958 and September 17, 1959. On October 21, 1959 plaintiff filed a motion to vacate the order of September 17, 1959 and for leave to file a [fol. 673-b] second amended and supplemental complaint. On November 23, 1959 the Court granted plaintiff's motion to dismiss its appeal and took under advisement plaintiff's motion to file a second amended complaint.

On March 10, 1960 the Court granted plaintiff's motion for leave to file a second amended and supplemental complaint and vacated the order of September 17, 1959 dismissing the action. On March 21, 1960 defendants filed a notice of appeal from the order of March 10, 1960. On May 16, 1960, the mandate of this Court was filed in the district court dismissing defendants' appeal on the motion of plaintiff.

On July 19, 1960 defendant J. I. Case Company renewed its motion for security for expenses. This motion was set for hearing by the Court on January 2, 1962 at which time the Court entered an order directing plaintiff to file an amended complaint separating his cause of action based on diversity of citizenship from his cause of action based on violations of federal law. On January 12, 1962 plaintiff filed a third amended and supplemental complaint. On January 26, 1962 defendant J. I. Case Company renewed its motion for security for expenses.

On September 4, 1962 the Court rendered a written opinion and entered an order directing plaintiff to furnish security for expense in the amount of \$75,000 as to count 1 of the third amended and supplemental complaint but permitting plaintiff to file a fourth amended and supplemental complaint alleging only a cause of action for a declaratory judgment under § 14a of the Securities Exchange Act of 1934. On September 7, 1962 plaintiff filed a motion to amend the order of September 4, 1962 so as to permit an interlocutory appeal under § 1292(b)

of the Judicial Code. The order was so amended on October 1, 1962. On October 24, 1962 this Court granted plaintiff's petition for leave to appeal from the order of October 1, 1962.

[fol. 674] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 56 C 247

[Title omitted]

THIRD AMENDED AND SUPPLEMENTAL COMPLAINT—

Filed January 12, 1962

Carl H. Borak, plaintiff, by his attorneys, Bruno V. Bitker, Alex Elson and Arnold L. Shure, alleges upon information and belief, except as to paragraphs 1 and 2 of count I which are alleged on personal knowledge, as follows:

COUNT I

1. Plaintiff Carl H. Borak, at all times herein mentioned, was and now is a resident and citizen of the State of Illinois. He is, and at the time of the matters complained of herein was, the registered and beneficial owner of 2000 shares of common stock of J. I. Case Company, ("Case"). Five Hundred shares were purchased in 1952 which became 1000 shares in a subsequent 2 for 1 stock split and 1000 shares in 1955.

[fol. 675] 2. Plaintiff brings this action in a representative capacity on behalf of himself and all other holders of common stock immediately prior to the merger hereafter described, and their successors in interest, excluding all holders of common stock who were directors of Case just prior to the merger and such holders of common stock who were apprised of the acts and wrongdoing hereafter described, the total holdings of which shareholders are in

excess of 200,000 shares. The shareholders whom plaintiff represents constitute a class in excess of 4,000 persons and are so numerous it is impractical for all to join as plaintiffs. Plaintiff is well able to represent such common stockholders fairly and effectively.

3. Defendant Case, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, is a resident of and doing business in that state and has its principal office in that state.

4. The other defendants and their states of residence are as follows:

	Director From To	Other Position Held with Case	Citizen Of
L. R. Clausen	1924 - 1958	Consultant and former President	Wisconsin
John T. Brown	1947 - 1962	Formerly Chairman & Vice Chairman of Board of Directors and President	Wisconsin
H. G. Barr	1952 - 1960	Formerly Vice President	Wisconsin
William J. Grede	1953 - 1962	Chairman of Executive Committee from 1956-1962 and President from 1960 to 1962	Wisconsin
William B. Peters	1955 - 1960	Formerly Vice President and Treas.	Wisconsin
Marc B. Rojzman	1957 - 1960	Formerly President, Executive Vice President and General Manager	Wisconsin
A. O. Choate	1914 - 1957		New York
William Ewing	1920 - 1960		New York
H. S. Sturgis	1927 - 1958		New York
E. P. Hamilton	1953 -		Wisconsin
Mentor Kraus	1957 -		Indiana
Nathaniel C. Beeber	—		New York

[fol. 676] Edward L. Elliott was a director of Case from 1957 until 1959. He died on or about October 15, 1959. By leave of Court, the executor of his estate, John B. Elliott,

was substituted as defendant for him. John B. Elliott is a citizen of New Jersey.

All defendants who are now Case directors are sued individually and in their capacities as such directors.

Marc B. Rojzman ("Rojzman") is sued individually and as representative of all ATC shareholders who received Case common and second preferred stock in consequence of the Case-ATC merger. Such shareholders constitute a class so numerous as to make it impracticable to bring them all before the Court. All such shareholders are made parties as a class for the purpose of securing certain relief herein requested against this class. The interests of all members of such class are fairly and adequately represented by Rojzman. Nathaniel C. Beeber is sued individually and as a representative of all holders of common stock purchase warrants issued by ATC to the purchasers of its preferred stock, Series 56-1. Such holders constitute a class so numerous it is impracticable to bring them all before the Court. All such holders are made a class for the purpose of securing certain relief herein requested against this class. The interests of all members of the class are fairly and adequately represented by Beeber. All defendants are citizens and residents of states other than Illinois.

5. Jurisdiction is conferred on this court by Section 1332 of the Judicial Code (28 U.S.C. § 1332) in that there is diversity of citizenship between the plaintiff and all defendants and in that the sum or value in controversy, exclusive of interest and costs, exceeds \$10,000.

6. Under the common law of Wisconsin shareholders of Wisconsin corporations have preemptive rights—that is the [fol. 677] right to subscribe proportionately to all new or additional issues of corporate securities.

Section 180.21 of the Wisconsin Business Corporation Law provides: "Any preemptive right of a shareholder may be limited or denied to the extent provided in the articles of incorporation."

The Case Articles of Association as amended, contain no provisions regarding denial or limitation of preemptive

rights except with regard to a purported attempt to deny the rights in stock set aside under the stock option plan.

Defendants have recognized the existence of the right in relation to stock issued pursuant to stock options (page 20 of the Proxy Statement hereafter described), with respect to all stock issued for cash (Proxy Statement, pp. 18, 19) and with respect to the issuance of \$20,130,400 subordinated debentures on October 15, 1958 (Prospectus, dated October 15, 1958, pages 1, 3 and 20).

7. Plaintiff brings this action to enforce the preemptive rights of himself and other holders of common stock similarly situated to him with respect to certain shares of common and second preferred stock (hereafter described) which were issued pursuant to a purported statutory merger between Case and ATC, formerly a New York corporation. Plaintiff seeks also to enforce preemptive rights with respect to any shares issued for cash pursuant to ATC stock warrants convertible into Case common and second preferred stock and pursuant to a stock option plan, amendments to which were purportedly adopted by Case. Both the merger plan and stock option amendments purportedly were approved by the shareholders of Case at a special meeting held on November 15, 1956. The merger plan, which required the favorable vote of two-thirds of the outstanding common and preferred stock, each voting separately as a class, was declared approved by a close margin. [fol. 678] On January 10, 1957, Case and ATC purportedly completed action required under the laws of Wisconsin and New York to consummate the merger. Both the merger and stock option proposal were formally announced to the shareholders about October 15, 1956 by means of a Proxy Statement which included a letter dated October 15, 1956, from J. T. Brown, then President and Chairman of the Board of Directors of Case, a notice of the November 15, 1956 special meeting of stockholders and a proxy statement describing the plan. Also included were the plan of merger, articles of merger and certificate of consolidation. The proxy statement is attached to the original complaint as Exhibit A, and is incorporated herein by reference.

8. Under the terms of the merger and stock option plan 648,852 shares of common stock (including 195,000 shares issuable for cash) and 1,197,704 shares of second preferred stock (including 90,000 shares issuable for cash) were issued or set aside without granting plaintiff and other common shareholders similarly situated to him their preemptive rights to subscribe to said shares.

Said merger and stock option plans and the consummation thereof were effectuated by a series of illegal and fraudulent acts hereafter described and in consequence thereof the plaintiff and other shareholders similarly situated to him were deprived of their preemptive rights in the shares of common and second preferred stock issued pursuant to the merger and stock option plans.

9. In May, 1954, Edward L. Elliott (hereafter "Elliott") negotiated for ATC a loan of \$250,000 from a New York bank and at the same time formed and headed a syndicate which lent ATC \$250,000. As part of the transaction, Elliott and Company (Elliott's stock brokerage firm) acquired 20,000 shares of ATC common at 51¢ a share and the syndicate 150,000 shares at the same price.

[fol. 679] Elliott devised a plan for ATC to avoid registration of the securities under Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, and the issuance of a formal prospectus. Such a prospectus would have revealed ATC's weak condition and impeded the stock promotion plan. Elliott avoided SEC registration through unlawful recourse to the private offering exemption of Section 4 (1) of the Securities Act of 1933, 15 U.S.C. § 77(d).

At or about the same time ATC made a public offering through Elliott and Company of 24,000 shares of ATC common stock at \$4.125 a share and on August 31, 1954, filed under Regulation A of the Securities Act of 1933 an offering circular which was false, misleading and fraudulent in several material respects. Elliott and Company moreover in violation of regulations of the Securities Act of 1933, sold to the public all of the 24,000 shares prior to the filing or approval of the offering circular.

Over the counter trading began about July 1954 and on January 17, 1955 ATC common was listed on the American Stock Exchange.

From 1954 until the merger with Case, approximately 80% of the total outstanding stock of ATC was closely held by Rojzman, Elliott and their associates.

Commencing in June 1954 and continuing until the merger of ATC with Case, Elliott conducted a concerted campaign of bringing ATC to the attention of stock brokers, analysts, security investment advisers and anyone else who might help promote ATC stock.

The total outstanding stock in the hands of the public was small. Total trading in ATC was relatively light with the price often changing widely on narrow trading.

10. Beginning in July, 1954 the market price of ATC common enjoyed a spectacular rise. On August 18, 1955 the [fol. 680] stock was split 2 for 1. The stock price ranges from the third quarter of 1954 to the third quarter of 1956 were:

	<i>Before Split</i>		<i>After Split and Adjusted for Split</i>	
	<i>High</i>	<i>Low</i>	<i>High</i>	<i>Low</i>
3rd Quarter 1954	53 $\frac{3}{4}$ *	3**	27 $\frac{7}{8}$ *	1 $\frac{1}{2}$ **
4th Quarter 1954	123 $\frac{3}{4}$ *	7**	63 $\frac{3}{8}$ *	3 $\frac{1}{2}$ **
1st Quarter 1955	191 $\frac{1}{4}$	12	95 $\frac{5}{8}$.	6
2nd Quarter 1955	30	19	15	9 $\frac{1}{2}$
3rd Quarter 1955			14 $\frac{5}{8}$	12 $\frac{3}{4}$
4th Quarter 1955			177 $\frac{7}{8}$	13
1st Quarter 1956			161 $\frac{1}{4}$	133 $\frac{3}{8}$
2nd Quarter 1956			143 $\frac{3}{4}$	131 $\frac{1}{2}$
3rd Quarter 1956			15	121 $\frac{1}{8}$

* High offer over-the-counter

** Low bid over-the-counter

11. The foregoing rise in price was attained notwithstanding that:

- a) At all times 80% or more of the common stock was closely held by Rojzman, Elliott and their associates.
- b) At all times ATC was in a precarious financial condition.

- c) ATC never paid a dividend on its common stock and in fact could not pay a dividend under the terms of its first mortgage.
- d) ATC book value was about \$1.15.
- e) Prior to 1952 and for the years 1948-1951 inclusive, ATC had an earned surplus of only \$49,542.
- f) ATC had net losses of \$39,908 in 1952, \$88,814 in the eight months ended August 31, 1953 and \$166,871 in the fiscal year ended August 31, 1954, and net profits of \$246,782 in fiscal 1955 and \$306,211 in the eleven months ending July 31, 1956. Thus, in its best year, (fiscal 1955) earnings were about 32 cents per share.

12. On July 2, 1959 one John A. Latimer was indicted in the United States District Court for the Southern District [fol. 681] of New York (Case No. CR. 159-188) for manipulating alone and with other persons ATC stock during the period from May, 1955 through February, 1956.

On March 30, 1960 the United States District Court for the Southern District of New York in Case No. CR. 159-188, entitled United States of America v. John A. Latimer, entered the following judgment, the relevant portion of which reads as follows:

"It Is Adjudged that the defendant has been convicted upon his plea of guilty of the offense of unlawfully effecting transactions on the American Stock Exchange in the common stock of American Tractor Company. (Title 15, Sections 78 (i)(a)(1), 78 (i)(a)(2) and 78ff(a), U.S.C.) as charged in fifty-one counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court, It Is Adjudged that the defendant is guilty as charged and convicted."

Elliott admitted during the course of his deposition by plaintiff that he knew prior to the merger that Latimer had engaged in manipulative activity in ATC stock.

In its preliminary report and investigation of the American Stock Exchange, filed January 5, 1962, the Securities & Exchange Commission noted that Gilligan, Will & Company was the specialist on the American Stock Exchange for ATC common stock; that it acquired such stock prior to the listing of ATC on the exchange and otherwise engaged in various improper and illegal activities while specialist with respect to said stock. Elliott was a close friend and associate of members of Gilligan, Will & Company.

13. In approving the merger the defendants who were then Case directors violated the Wisconsin Business Corporation Law and breached their fiduciary duties to the plaintiff and other shareholders similarly situated in the following particulars:

(a) The Wisconsin Business Corporation Law provides as follows:

Section 180-14(1):

"Shares having a par value may be issued for such consideration, not less than the par value thereof, as shall be fixed from time to time by the Board of Directors."

Section 180-15(1):

"The consideration for the issuance of shares may be paid, in whole or in part, in money, in other property, tangible or intangible, or in labor or services actually performed for the corporation. When payment of the consideration for which shares are to be issued shall have been received by the corporation such shares shall be deemed to be fully paid, and non-assessable by the corporation."

Section 180-15(3):

"In the absence of fraud in the transaction, the judgment of the board of directors or the shareholders, as the case may be, as to the value of the consideration received for shares shall be conclusive."

(b) The directors violated Sec. 180-15(1) in that they included the future earnings of ATC and the future services of Rojzman and other ATC officials as part of the consideration paid by ATC for the issuance of Case shares. Such future earnings and future services are neither valid consideration nor a proper element of value.

(c) In fixing the consideration for the shares of stock to be issued by Case to ATC for the assets of ATC, the Board of Directors of Case violated Section 180-14(1) in that the consideration fixed was less than the par value of such securities.

The directors of Case fixed what they describe as "the minimum fair value of the net assets of ATC to be acquired in the merger" at \$14,757,068. (Proxy Statement, page 40.) [fol. 683] The par value of the Case securities issued was \$14,677,078, determined as follows:

1,107,704 shares of 6½% Second Cumulative Preferred Stock, \$7 par value	\$7,753,928
553,852 shares of Common Stock, \$12.50 par value	6,923,150
	<hr/>
	\$14,677,078
	<hr/>

As part of the merger agreement Case agreed additionally to redeem the preferred stock of ATC at a cost to Case of \$2,362,500. Of this sum \$1,050,000 was received by Case in redemption of the ATC preferred purchased by it on September 24, 1956 but \$1,312,500 was paid to third parties and hence this sum must be deducted from the \$14,757,068 found to be the minimum fair value of ATC assets. Hence the consideration received for the shares is \$13,444,568 which is \$1,232,510 less than par value.

(d) In fixing the consideration paid for the shares of Case stock issued to ATC stockholders upon consummation of the merger the directors further violated the requirements of Section 180-14(1) by making a determination of the "minimum fair value" of the assets received from ATC. The directors were under a clear statutory duty to fix the consideration at a specific amount.

(e) The directors of Case did not in fact make the valuation required by Sec. 180-14(1) for the reason that the purported valuation placed on the assets of ATC represented merely a mechanical computation determined to equal the par value of the stocks which by the terms of the merger agreement Case was obligated to issue to the shareholders of ATC.

(f) The price paid for ATC was excessive in relation to ATC earnings; the purchase price exceeding \$17,000,000 was more than fifty times the earnings for the company's best year, a grossly excessive ratio. On the basis of average [fol. 684] earnings of ATC from 1952 to 1956 the purchase price was about 218 times earnings.

(g) In respect to earnings ATC was grossly overvalued and Case grossly undervalued: Case exchanged for each share of ATC stock—average earnings about 7¢, one-half share of Case common (average earnings 40½¢ plus 1 share \$7.00, 6½% second preferred, dividend 45½¢ a total of \$.86). An exchange on this basis was grossly unfair to and a fraud upon the Case common shareholders.

(h) In respect of book value, ATC was grossly overvalued and Case grossly undervalued. The book value of ATC common stock was only about \$1.15 per share in contrast with a book value of \$36 per share for the common stock of Case. Not considering the inflated value placed on ATC assets, ATC shareholders received about \$20.26 in book value for each of their shares (one-half share Case common, book value after the merger \$13.26 plus one share Case second preferred, par \$7). In total, ATC shareholders received Case common stock having a book value of about \$14,685,799 plus preferred stock paying 6½% dividends, and having a par value of \$7,753,928 or a total of about \$22,400,000 in exchange for shares which had a book value of \$1,275,653. The book value exchange ratio which was in excess of 17 to 1 was grossly unfair to and a fraud upon the Case common shareholders.

(i) The directors wrongfully relied on the market price of ATC common as a measure of value of ATC.

(j) In determining value of part of the physical assets of ATC, the Case directors wrongfully relied on an appraisal of said property by a firm hired by ATC prior to the merger. The appraisal inflated the value of such assets by more than 100%. Moreover, while the proxy statement says the Case directors relied on this appraisal most of them never saw it and some never heard of it.

[fol. 685] (k) The Case directors improperly considered as an element of value the projected future earnings of ATC.

(l) The directors of Case failed to consider that even the \$17,000,000 price would not represent the full cost of ATC to Case. At the time of the merger, ATC was so critically short of cash that it was scarcely a viable entity, and in fact it was necessary for Case to invest \$1,000,000 in ATC before shareholder approval of the merger so that it could survive.

Thereafter, in October, 1958, it was necessary for Case to borrow \$20,130,400 on subordinated 5½% debentures, and in April, 1959, to borrow \$25,000,000 on 15 year, 5¾% notes. These loans were necessitated in large part by the ATC merger. The interest charges on these loans, exceeding \$2,500,000 per year, constitute a prior claim to earnings ahead of the common stock.

14. The defendant Case directors breached their fiduciary obligations to the Case common shareholders by approving and issuing the Proxy Statement of October 15, 1956 (including Brown's Letter) which contained numerous material omissions, false representations and misleading statements which, among others, include the following:

a) Brown's letter and the Proxy Statement fail to state expressly the total price Case paid for ATC, exceeded \$17,000,000.

b) The Proxy Statement, moreover, gives the false impression (p. 40) that the price being paid is the "minimum fair value" of the net assets of ATC as fixed by the directors, namely, \$14,757,068.

c) The letter and statement fail to state that the book value of Case common was \$36.00 per share and ATC common \$1.15. The letter states that the net book worth of ATC adjusted to reflect the subsequent issue of 50,000 shares of ATC preferred to Case was \$3,525,653, but fails [fol. 686] to state explicitly that prior thereto ATC net book worth was only \$2,525,653. The effect of this omission was to inflate the apparent value of ATC and reduce the disparity between the price paid by Case and the book value of the assets to be received.

(d) The proxy statement which displays prominently on page 7 the comparative market prices of Case and ATC common stocks, led the Case shareholders to infer that the proposed terms of merger were fair because in accordance with the comparative market price of the two stocks.

(e) The letter and proxy statement fail to state that the \$1,000,000 investment in ATC by Case was necessary to maintain ATC as a going concern until the merger would be consummated, and that after approval of the merger Case would have to invest additional millions of dollars for working capital in order to continue operating ATC.

(f) The prospectus states falsely (page 2) that the Case common "would not be affected" as a result of the merger, whereas in fact the Case common was affected substantially and adversely in the following particulars: The 1,107,704 shares of the new \$7.00, 6½% preferred have a prior claim on earnings totaling about \$500,000 per year. In addition, there will be charges against earnings averaging about \$680,000 per year for approximately 20 years for amortizing the \$13,463,000 difference between the price of the ATC assets and their book value. This charge will be borne principally by the former Case common shareholders.

The letter and statement fail to state explicitly that after the \$500,000 and \$680,000 have been charged to earnings, the Case shareholder group as constituted before the merger must share the remaining earnings with the holders of the 553,852 shares of Case issued to the holders of the ATC common.

[fol. 687] (g) The statement that the Case common will not be "adversely affected" is false for the further reason that no statement was made apprising the Case shareholders that control of the Case Company was being placed in the hands of Rojzman, Elliott and those associated with them.

The passing of control of Case to these persons was further concealed by a misstatement in the proxy statement that Ellen B. Elliott (Wife of Elliott) held only 5,000 shares of ATC preferred when in fact she also held 90,000 shares of ATC common.

(h) While the letter and proxy statement overstate facts favorable to ATC, they tend to make the position of Case appear worse than it was in actuality. In particular, for ATC the prospectus sets forth the earned surplus account for the years from 1952 to a current date in 1956 (page 32). On page 26, however, similar information is presented with reference to Case for the period from 1953 to 1956. This fact is significant because in 1952 Case experienced a good year in which sales exceeded \$153,000,000, net income exceeded \$7,000,000 and earnings per share were \$2.82, a sum more than double the book value of ATC common. Moreover, on page 26 of the proxy statement the net loss of Case for the nine months ended July 31, 1956 is stated to be \$3,703,389. On the basis of this information the reader of the proxy statement would infer that the loss for the 1956 fiscal year would be approximately \$5,000,000. In fact, however, the loss for 1956 was \$987,000, an amount far less than the loss stated for the nine-month period. Since the letter and the prospectus were dated October 15, 1956, only two weeks short of the close of the 1956 fiscal year, the directors knew or should have known that the nine months' results gave a false picture of fiscal 1956.

(i) The proxy statement fails to state that the recipients of the stock options were the persons who had negotiated the terms of the merger which included the stock options.

[fol. 688] (j) The proxy statement fails to reveal that Grede Foundries Inc., which is owned and controlled by William J. Grede, was a supplier of castings to Case and

ATC and that it would receive a substantial increase in business as a result of the merger.

(k) The letter and proxy statement misstate that ATC was a then producer of medium size crawler tractors and that Case would gain an immediate entry into the road-building and heavy construction equipment business if the merger were approved.

(l) The proxy statement misrepresents ATC's current and prospective competitive situation.

(m) The letter and proxy statement misstate that Case and ATC branches, dealers and distributors would be capable of handling the merged line of equipment.

(n) The proxy statement fails to state that the Case common shareholders had preemptive rights to the shares of common and second preferred stock issued pursuant to the merger.

(o) The proxy statement fails to state that the stock market price of ATC common stock was inflated, maintained and manipulated.

15. These omissions, false representations and misleading statements in the letter and proxy statement were material to the merits of the merger proposal. The shareholders of Case relied thereon in voting on the merger. The merger was approved by a close margin. It would not have been approved if the letter and proxy statement had not contained such omissions, false representations and misleading statements.

16. The merger and stock option plans were tainted with self dealing by the "Case Management Group" (Brown, Grede and Clark M. Robertson, the latter being a director and general counsel) and the "ATC management group" (Rojtman, Elliott and Kraus). The Case management group promoted the merger in order to perpetuate themselves in office by shifting voting control of Case to Rojtman [fol. 689] man, Elliott and their confederates. Rojtman and Elliott promoted the plan in part in order to obtain a market for their large holdings in ATC, the stock market

price of which had been inflated, maintained and manipulated by Rojzman and Elliott and their associates.

In arriving at a basis for exchange of stock on the merger the ATC management group insisted upon giving full effect to the current stock-market price of ATC stock. The Case management group and other Case director defendants did give such effect to and relied upon the stock market price of ATC stock.

The stock market price of ATC was inflated, maintained and manipulated by Rojzman, Elliott and their confederates. The Case management knew and the other Case director defendants knew or in the exercise of ordinary care should have known that the market price of ATC was achieved in this illegal and artificial manner.

Brown, Grede and Rojzman were also guilty of self dealing in securing for themselves valuable stock options as one of the terms of the merger.

Grede, who was the prime mover of the merger for Case also was guilty of self dealing in that at the time of the merger his Company, Grede Foundries, Inc., was supplying castings to Case and ATC and after the merger his company received a substantial increase in business. In the fiscal years ending October 31, 1955 and 1956 Grede's combined sales of castings to Case and ATC were approximately \$33,000 and \$88,000, respectively; and after the merger, in fiscal 1957, 1958 and 1959, Grede's total sales to Case were approximately \$435,000, \$674,000 and \$475,000, respectively. Neither Grede nor the other defendants having knowledge of these self dealing transactions revealed this information until plaintiff learned of it in the course of [fol. 690] taking the deposition of Grede. Thereafter Case has circumspectly stated this relevant information in its 1958 Debenture prospectus and Annual Proxy Statements to its shareholders.

17. The acts alleged in paragraphs 9-16 inclusive constitute actual or constructive fraud by defendants upon plaintiff and other shareholders similarly situated and such conduct deprived the latter of their preemptive rights.

18. If defendants had afforded plaintiff and other shareholders similarly situated to him the right to subscribe to

shares issued in the merger on the same basis granted to ATC shareholders; plaintiff and other shareholders similarly situated to him would have been entitled to purchase approximately one-quarter share of Case common and one-half share of second preferred stock for a total subscription price of approximately \$2.20 for each share of Case common held by them at the time of the merger.

19. (a) The directors of Case included the future services of Rojzman and other ATC officials as part of the consideration paid by ATC for the issuance of Case shares. In fact, as a precondition to the merger the employment of Rojzman was arranged and in consideration thereof he was given an option to purchase 25,000 shares of common stock of Case. (The option period is ten years; the option price the fair market value of the stock on the date the option was granted.) Brown in his letter of October 15, 1956, held out as an inducement to the Case shareholders to approve the merger, the fact that Rojzman would become Executive Vice President and General Manager, a director and a member of the Executive Committee of the Board of Directors immediately after the merger. Subsequently, he became President.

(b) On or about February 1, 1960, Case suddenly announced that Rojzman had resigned as President of Case and that he had resigned as a member of the Board of Directors and Executive Committee. Case further announced that henceforth Rojzman was to be a special adviser to the President and the Case Executive Committee. He is not to make his headquarters at Racine, the site of Case's principal office, his position is not to be a full time one and he is to be consulted at Case's option. Pursuant to questioning by one of plaintiff's attorneys at the annual meeting of stockholders held on April 21, 1960, Grede revealed for the first time that Rojzman received a three year contract at \$40,000.00 a year for such consulting service. In a printed brochure entitled "Statement of President—Annual Meeting of Stockholders—4-21-60", mailed to Case shareholders subsequent to said meeting, Grede does not mention Rojzman's contract for consulting service.

(c) Grede succeeded Rojzman as President of Case. On or about December 29, 1961 Grede resigned as President, Chairman of the Board of Directors and of the Executive Committee and as a director. At the same time Brown resigned as Vice Chairman of the Board of Directors and as a director. Only one of the Case directors who was serving as such in November, 1956 and who was named as a defendant remains a Case director (Hamilton).

(d) On or about December 29, 1961, Case also announced it (and its wholly owned subsidiary credit company) had secured another extension of its short term bank indebtedness of \$162,000,000 for three years (the first extension was for \$178,000,000 for about one year). But for these bank loan extensions, Case would be in bankruptcy, receivership or reorganization.

For the fiscal year ending October 31, 1960 Case had a net loss of \$39,814,793 which reduced accumulated earnings to \$13,100,391 from \$42,932,616 at the time of the attempted merger. For the first 9 months of fiscal year 1961 Case's net loss was \$7,121,308 and for the full year may exceed \$10,000,000 reducing accumulated earnings to \$3,000,000 or less.

[fol. 692] Case's losses and lack of funds also required it to stop dividend payments on its first preferred stock in 1961, dividends which had been paid continuously since 1935.

(e) On or about August 31, 1961 Case wrote off \$11,546,066 of the excess of cost of ATC assets acquired over the assigned value thereof. According to the proxy statement the Case management's plan with respect to this excess was to "adopt a plan of amortization, over some period not in excess of 20 years * * * starting with the fiscal year beginning November 1, 1957. Such plan will provide for annual charges determined by the extent of the accomplished degree of integration of the companies' operations."

(f) Case also announced in 1961 that it was abandoning production of crawler tractors at the plant in Churubusco, Indiana, the only plant facility acquired from ATC.

20. Plaintiff and other holders of common stock of Case similarly situated to him have been severely and irreparably damaged by the failure to recognize their preemptive rights. They have no adequate remedy at law.

Wherefore, plaintiff prays that this Court:

I. Grant such of the following relief as it deems equitable:

a) Enter judgment in favor of the plaintiff and all other Case shareholders similarly situated and against the Case directors who approved the merger, Rojzman, Elliott and such of the other defendants as the Court finds responsible for the merger and the consequent deprivation of preemptive rights in an amount to be determined by the Court;

b) Enter a decree directing Case to issue to plaintiff and all other Case shareholders similarly situated and their successors in interest, on such terms as the Court may fix, such securities of Case as the Court deems necessary to compensate them for the violation in the merger of their preemptive rights.

[fol. 693] II. Grant such other and further relief, including allowances to plaintiff for his costs, disbursements and counsel fees, as equity shall require.

Count II

1. Jurisdiction is conferred on this court by: (1) Section 1332 of the Judicial Code (28 U.S.C. §1332), in that there is diversity of citizenship between the plaintiff and all defendants and in that the sum or value in controversy, exclusive of interests and costs, exceeds \$10,000; (2) Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78 aa); (3) Section 1331 of the Judicial Code (28 U.S.C. §1331) in that the matter in controversy exceeds the sum or value of \$10,000 and arises under the laws of the United States; and (4) Section 1337 of the Judicial Code (28 U.S.C. §1337) in that the action arises under an Act of Congress regulating commerce.

2. Plaintiff adopts and alleges as if specifically set forth herein, paragraphs 1-4, 6-12, 14-15 and 18 inclusive of Count I.

3. Defendants, by the use of the mails and other instrumentalities of interstate commerce, solicited or permitted the use of their names to solicit proxies by means of the proxy statement dated October 15, 1956 referred to herein, which proxy statement contained materially false and misleading statements and omissions of fact, all as set forth in particular in paragraphs 14-15 of Count I and realleged in paragraph 2 of Count II, in wilful violation of Sections 10(b) and 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§78j(b), 78 n (a) and Rules X-10b-5 and X-14a and particularly Rules X-14a-3(a) and X-14a-9 promulgated thereunder, 17 C.F.R. 240.10b5, 240.14a.

By reason of the violations of Sections 10(b) and 14(a) of the Securities and Exchange Act of 1934 and Rules [fol. 694] X-10b-5 and X-14a promulgated thereunder, as set forth above, the merger and all contracts made pursuant thereto between the defendants are void under Section 29(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78 cc (b).

4. By reason of the aforesaid violations of the Securities and Exchange Act of 1934 plaintiff and other holders of common stock of Case similarly situated to him have been severely damaged.

Wherefore, plaintiff prays that this Court:

I. Grant such of the following relief as it deems equitable:

(a) Declare and adjudge that (1) the proxy statement was false and misleading in material respects and the proxies solicited illegal and void, under sections 10(b) and 14(a) of the Securities and Exchange Act of 1934; and (2) the merger and all agreements made pursuant thereto are void under section 29(b) of said Act for violations of sections 10(b) and 14(a) of said Act;

(b) Enter a judgment for damages growing out of violations of the aforesaid provisions of the Act.

II. Grant such other and further relief, including allowances to plaintiff for his costs, disbursements and counsel fees, as equity shall require.

Alex Elson, Arnold I. Shure and Bruno V. Bitker,
By: Alex Elson.

Alex Elson, Arnold I. Shure, 11 South LaSalle Street, Chicago 3, Illinois; Bruno V. Bitker, 208 East Wisconsin Avenue, Milwaukee, Wisconsin, Attorneys for Plaintiff.

[fol. 695] *Duly sworn to by Carl H. Borak, jurat omitted in printing.*

[fol. 708] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

No. 56 C 247

[Title omitted]

NOTICE OF MOTION REQUIRING PLAINTIFF TO GIVE
SECURITY, ETC.—Filed January 26, 1962

To: Alex Elson, 11 South LaSalle Street, Chicago 3, Illinois; Bruno Bitker, 208 E. Wisconsin Avenue, Milwaukee 2, Wisconsin; Arnold I. Shure, 11 South LaSalle Street, Chicago 3, Illinois, Attorneys for the Plaintiff.

Please Take Notice that upon the affidavit of Walter S. Davis dated July 19, 1960, and filed with this Court on that date, and upon all prior pleadings and proceedings herein, the undersigned will renew its motion before this Court at its courtroom in the Federal Building in the City of Milwaukee, Wisconsin, at such time as the Clerk shall fix, for an order:

1. Requiring the plaintiff to give security pursuant to the provisions of Section 180.405(4) of the Wisconsin Statutes, 1957, in the amount of One Million Dollars (\$1,000,000) for the reasonable expenses, including attorneys' fees,

which have been or may be incurred by the defendant J. I. Case Company in connection with this action, and for such [fol. 709] expenses as have been or may be incurred by others who are or may become parties defendant, for the payment of which J. I. Case Company may become liable pursuant to Section 180.407 of the Wisconsin Statutes, 1957, or otherwise, on the ground that the plaintiff owns less than three per cent (3%) of the outstanding shares of said J. I. Case Company; and

2. Providing that, pending deposit of such security, all further proceedings on behalf of the plaintiff be stayed; and

3. Directing that, if the plaintiff should fail to give security within the time and in the manner directed, the Clerk of the Court, upon proofs by affidavit by the defendant J. I. Case Company that the plaintiff has failed to file a security within the time and in the manner provided, shall enter judgment dismissing the action as to all the defendants, with costs.

Robertson, Hoebreckx & Davis, By Walter S. Davis,
Attorneys for the Defendant, J. I. Case Company.

324 E. Wisconsin Avenue, Milwaukee 2, Wisconsin, Of
Counsel: H. Maxwell Manzer, 1 S. Pinckney Street, Madison
3, Wisconsin.

[161.719]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
No. 56-C-247

CARL H. BORAK, for and on behalf of himself and all of the other common stockholders of J. I. CASE COMPANY, who are similarly situated to him, Plaintiff;

—VS.—

J. I. CASE COMPANY, a Wisconsin corporation, MARC B. ROJTMAN, individually and as representative of all AMERICAN TRACTOR CORPORATION shareholders who received J. I. CASE COMPANY common and second preferred stock in the merger herein referred to, and their successors in interest, JOHN B. ELLIOTT, Executor of the Estate of Edward L. Elliott, deceased, A. O. CHOATE, WILLIAM EWING, L. R. CLAUSEN, H. S. STURGIS, JOHN T. BROWN, H. G. BARR, WILLIAM J. GREDE, E. P. HAMILTON, WILLIAM B. PETERS, MENTOR KRAUS, and NATHANIEL C. BEEBER, individually and as representative of all holders of common stock purchase warrants issued by American Tractor Corporation to the purchasers of its preferred stock, Series 56-1, Defendants.

OPINION—September 4, 1962

This action was commenced on November 13, 1956, when the plaintiff, Carl H. Borak, filed his complaint against the J. I. Case Company, John T. Brown, H. G. Barr, L. R. Clausen, William J. Grede and William B. Peters, the individual defendants being officers and/or directors of Case, alleging that a then proposed plan of merger between Case and American Tractor Corporation was against the best interests of Case's common stockholders, of whom the plaintiff was one, and had not been formulated or developed in conformity with the obligations imposed by law on Case's officers and directors, and asking that the court declare the

[fol. 720] plan of merger and any action taken pursuant thereto illegal and void and enjoin the defendants from further acting to consummate the plan. That same day, on application of the plaintiff, the court ordered Case to show cause why it and its officers, agents and employees should not be restrained, pending final hearing of this cause, from taking any steps to advance the plan of merger. A hearing on the order to show cause was scheduled for and held on November 14 and 15, 1956, at which counsel for the plaintiff stated that he was not claiming that there was any fraud in this case. Following the hearing the court denied the plaintiff's application for a temporary injunction. The merger plan was approved by Case stockholders on November 15, 1956, and consummated shortly thereafter.

Shortly after issue was joined by the filing of the answer on November 26, 1956, the court held the first of many conferences in this case. Plaintiff's counsel there stated that the nature of the case demanded resort to very extensive discovery procedures before he could file an amended complaint. It was not until April 1, 1958 that the first amended and supplemental complaint was filed. In this amended and supplemental complaint which named as defendants the original defendants, other directors of Case, and others who allegedly benefitted by the merger of Case with American Tractor Corporation, the plaintiff asked in part that the court declare the plan of merger and action taken pursuant thereto illegal and void and enter judgment in favor of him and all Case shareholders similarly situated and against those responsible for the merger for \$12,000,000, or enter a decree setting aside the merger, or enter a decree determining the fair market value of American Tractor Corporation assets acquired by Case and directing American Tractor Corporation shareholders who received Case stock as a result of the merger to surrender for cancellation such portion thereof as the court deemed equitable, or enter a decree determining the fair market value of American Tractor Corporation assets acquired by Case and directing [fol. 721] Case to issue to plaintiff and other Case shareholders similarly situated such securities as the court deemed necessary to make equitable the relative interests of such shareholders and shareholders acquiring securities in

the merger, and that the court adjudge certain stock options illegal and void and order cancellation thereof, and forbid the exercise for the purchase of Case stock of certain stock purchase warrants as provided in the plan of merger and cancel such warrants.

Six days thereafter, the defendants moved for an order pursuant to §180.405(4), Wisconsin Statutes, requiring the plaintiff to give security for reasonable expenses incurred by Case in connection with this action or incurred by other defendants but for which Case may become liable, and directing that if plaintiff failed to give security the Clerk of Court should enter judgment dismissing the action as to all defendants. On October 13, 1958, the court rendered an oral decision holding that the plaintiff must furnish security under the statute in the amount of \$75,000. At that time plaintiff requested time within which to consider whether to amend his complaint and to attempt to secure agreement from other shareholders to join with him in this action.¹

On October 23, 1958, the court entered its order directing plaintiff, on or before December 12, 1958, to furnish defendant with security for reasonable expenses in the amount of \$75,000 and providing that if such security was not furnished as directed judgment dismissing the action would be entered. The order further provided that nothing therein contained should be construed so as to prevent plaintiff from seeking leave to file an amendment to his amended and supplemental complaint prior to December 12th joining as additional parties plaintiff the holders of at least 3% of Case's common stock.

[fol. 722] On December 2, 1958, the plaintiff filed a motion for re-hearing, asking in part that the order of October 23, 1958 be vacated. On December 16, 1958, Case moved for dismissal of the action on the grounds that no security had been furnished as required by the order of October 23, 1958. The plaintiff's motion for re-hearing was denied and the defendant's motion for dismissal was granted on September 17, 1959. A notice of appeal was filed by plaintiff on October 16, 1959. Five days there-

¹ Section 180.405(4) requires security on application of the defendants only in derivative actions brought by the holders of less than 3% of any class of issued and outstanding shares.

after, the plaintiff moved for leave to file a second amended and supplemental complaint, to dismiss certain of the defendants, and to vacate the order of September 17, 1959 dismissing this action or to modify that order by permitting the filing of the second amended and supplemental complaint. The proposed amended complaint attached to the motion, like the first and second complaints, set forth §1332, Title 28 U. S. C. as the section-conferring jurisdiction. The plaintiff asserted, however, that this complaint set forth a representative, and not a derivative, cause of action and that §180.405(4) would not be applicable thereto.

After the plaintiff moved to dismiss his appeal, which motion was granted, the court entered an order on March 10, 1960, vacating and setting aside the order of dismissal, granting the plaintiff leave to dismiss certain defendants, and granting him leave to file the second amended and supplemental complaint. Certain of the defendants appealed from this order, but the plaintiff's motion to dismiss the appeal was granted by the Court of Appeals and the mandate of that court was filed in this court on May 16, 1960.

On May 13, 1960 the plaintiff moved for leave to file a supplement to the second amended and supplemental complaint adding additional facts. This motion was heard on June 20, 1960, and the court granted the plaintiff leave [fol. 723] to file his second amended and supplemental complaint including the proposed supplement thereto within ten days. This order provided that the defendants should file their answer or otherwise plead to this complaint within twenty days of service.

The plaintiff's second amended and supplemental complaint was filed on July 1, 1960. We must here note that this pleading differed substantially from the proposed pleading which the plaintiff was granted leave to file and that no leave was requested for this variance. As stated before, the proposed second amended and supplemental complaint relied upon §1332, Title 28, U. S. C. as conferring jurisdiction on this court. The complaint as filed charged violation of the Securities Exchange Act of 1934 and relied for jurisdiction not only on §1332 but also on

§27 of that Act (15 U. S. C. 78aa and on §1331 and §1337, Title 28 U. S. C.

On July 19, 1960, the defendant Case filed another motion pursuant to §180.405(4) for security which motion came on for hearing on January 2, 1962. At that time, because the court believed that the plaintiff had improperly joined two causes of action in a single count, it directed him to file an amended complaint separating his cause of action based on diversity of citizenship from his cause of action based on claimed violations of Federal law by January 12, 1962. We also directed defendants to file their responsive pleadings by January 27, 1962 and provided that if motions were filed by the defendants, briefs in support of and in opposition to such motions would be filed by January 27 and February 6, 1962 respectively. On stipulation of the parties, the time for filing briefs was thereafter extended.

Plaintiff's third amended and supplemental complaint was filed on January 12, 1962. On January 26, 1962, Case [fol. 724] again filed a motion for security asking that the plaintiff be required to give security pursuant to §180.405(4), Wisconsin Statutes, in the amount of \$1,000,000 for reasonable expenses which have been or may be incurred by that defendant in connection with this action and for such expenses as have been or may be incurred by others who are or may become parties defendant for the payment of which Case may become liable, and asking that pending deposit of such security all further proceedings on behalf of the plaintiff be stayed, and directing that if plaintiff failed to give security as directed the Clerk of Court shall enter an order dismissing the action as to all defendants. A hearing thereon was held on May 28, 1962.

The third amended and supplemental complaint consists of two counts. In the first, the plaintiff relies on diversity of citizenship as a jurisdictional basis and alleges that he, the owner of 2000 shares of Case common stock acquired prior to the merger complained of, sues in a representative capacity on behalf of himself and all other common stockholders prior to the merger except those participating in or cognizant of the wrongdoing

alleged. In addition to Case, he joins as defendants certain of its directors and former directors, some of whom are also officers and former officers, and the executor of the estate of a deceased director. Defendants who are now directors of Case are sued individually and as directors, the defendant Rojtnan is sued individually and as representative of American Tractor Corporation shareholders receiving Case stock as the result of the merger between Case and American Tractor Corporation, and the defendant Beeber is also sued, individually and as representative of holders of certain purchase warrants. In Count 1, the plaintiff alleges substantially as follows:

In October 1956, Case formally announced to its shareholders a proposed plan of merger between Case [fol. 725] and American Tractor Corporation and proposed stock option amendments, which were purportedly approved by Case shareholders on November 15, 1956. The merger was purportedly consummated on January 10, 1957. Both the merger and stock option plan were effectuated by illegal and fraudulent acts and illegally deprived the plaintiff and other shareholders similarly situated of their pre-emptive rights—rights which the plaintiff here seeks to enforce. Under the merger and plan, 648,852 shares of common stock and 1,197,704 shares of second preferred stock were set aside or issued without granting the plaintiff's class their pre-emptive rights to subscribe thereto.

The plaintiff then describes in some detail the acts which he believes to have resulted in a violation of the pre-emptive rights of Case shareholders as follows:

In 1954, Elliott's company and a syndicate headed by him acquired 170,000 shares of American Tractor Corporation stock. Elliott violated the Securities Act of 1933 and regulations thereunder in connection with that stock and the sale of a portion thereof. Thereafter, the market price of American Tractor Corporation stock, most of which was held by Elliott, Rojtnan and their associates, began an unreasonable rise due to illegal manipulations, which manipulations Elliott was aware of.

Case directors violated Wisconsin law and breached their fiduciary duties in approving the merger by including future earnings of American Tractor Corporation and future services of its officials as partial consideration for issuance of Case stock, by agreeing to issue Case stock at less than par value, by failing to evaluate properly the American Tractor Corporation assets acquired and paying an excessive price for American Tractor Corporation, by overvaluing American Tractor Corporation's and undervaluing Case's earnings and book value resulting in a fraud on Case shareholders, by relying on market price of American Tractor Corporation stock as a measure of American Tractor Corporation's value, by relying on American Tractor Corporation's own appraisal of its physical assets and failing to examine that appraisal, by considering future earnings as an element of value and by failing to recognize the necessity of future investments as part of the cost of the merger.

Case directors breached their fiduciary duties by approving and issuing a letter and proxy statement of October 15, 1956, prior to the meeting at which the merger was approved which contained numerous material omissions and false and misleading statements relied upon by Case shareholders in approving the merger and without which the merger would not have been approved. Three pages of the complaint are given over to instances thereof.

Both the Case and American Tractor Corporation management groups were guilty of self-dealing in connection with the plan and merger.

The conduct of the defendants, the plaintiff claims, constitutes actual or constructive fraud on himself and other [fol. 727] shareholders similarly situated depriving them of their pre-emptive rights. He claims that if they had been permitted to purchase stock issued in the merger on the same basis as American Tractor Corporation shareholders, they could have obtained one-fourth share of common stock and one-half share of second preferred stock for \$2.20 for each share of Case common stock held by them at the time of the merger.

In Paragraph 19 of Count 1 of his complaint, the plaintiff alleges facts occurring after the merger, in Paragraph 20 he alleges that the class he represents has been irreparably damaged by failure to recognize pre-emptive rights, and in his prayer for relief he asks that the court enter judgment in favor of the class he represents and against Case directors who approved the merger and all defendants the court finds responsible for the merger and the consequent deprivation of pre-emptive rights in an amount to be determined and/or that the court enter a decree directing Case to issue to the class he represents such securities of Case as the court deems necessary to compensate the class for the violation of pre-emptive rights, and asks for such other relief as equity shall require.

In Count 2 of the complaint plaintiff asserts that the court has jurisdiction by reason of diversity of citizenship and under Federal law, charging that defendants violated the Securities Exchange Act of 1934 and regulations promulgated thereunder damaging the plaintiff and other common stockholders similarly situated, and that the merger and all contracts made pursuant thereto by the defendants are void. He asks that the court declare and adjudge that the proxy statement of October 15, 1956 was false and misleading and the proxies thereby solicited illegal and void under §10b and 14a of the Act, and that the merger and all agreements pursuant thereto are therefore void under §29b of the Act. He further asks a judgment for damages growing out of the violations of the Act and for [fol. 728] such other relief as equity shall require.

We are here concerned with the question of whether the provisions of §180.405(4) are applicable to the causes of action alleged by the plaintiff in his third amended and supplemental complaint. Because the court has previously treated the applicability of that section at great length in its oral opinion of October 13, 1958, we shall not reiterate all that has previously been stated in that regard, but shall merely state that on that date, after reviewing the applicable authorities, we pointed out that the provisions of that section are applicable only to actions brought "in the right of" a corporation, that is, derivative actions, and not to actions brought by a stockholder in his own behalf, that is, representative actions. We held that the plaintiff alleged a derivative cause of action in his amended and supple-

mental complaint. In so holding, however, we stated:
(Page 7 of Transcript)

"It seems clear to us that Wisconsin courts have generally held that where the injury suffered by the plaintiff stockholder is no different from, and is suffered in common with, that suffered by the other stockholders, an action to correct it is derivative, because the primary wrong is to the corporation, but where the injury is peculiar to the plaintiff, an action to correct it is representative. The only exception to this rule is that where the rights of stockholders to maintain their proportionate voice and influence in the corporation, which right is an individual one, is injured by an illegal issuance of stock, an action to cancel such stock is held to be representative even though the injury is common to all stockholders."

In his second and third amended and supplemental complaints, the plaintiff has grasped at the exception stated in the court's oral opinion of October 13, 1958, and attempted to bring himself within that exception. He has also added charges of violation of Federal law. In Count 1 of the third amended complaint, the only complaint with which we are now concerned, he has alleged the same facts which the court previously held asserted a derivative cause of [fol. 729] action to which §180.405(4) is applicable, garnished those facts with conclusory allegations that pre-emptive rights have been violated and asserted that he brings this action to enforce pre-emptive rights. In his carefully worded prayer for relief, however, he does not ask this court only to enforce those rights or compensate him and others similarly situated for the loss thereof, but asks for judgment against those responsible for the merger and consequent deprivation of pre-emptive rights in an amount to be determined by the court. After reviewing the allegations of Count 1, it is clear to us that the plaintiff still complains of fraud and self-dealing, failure of directors to perform their fiduciary duties, etc., as in the first amended and supplemental complaint, and seeks redress for the alleged wrongs on behalf of the corporation. He does not allege any wrong to himself different from that suffered by other stockholders, nor limit the relief sought to

damages sustained by reason of loss of pre-emptive rights. He is concerned in our opinion not with the fact that stock was issued to others without being offered first to Case stockholders but with the fact that stock was issued for an allegedly insufficient consideration. We therefore hold that §180.405(4) is applicable, that Count 1 sets forth a derivative cause of action and that the plaintiff must furnish security for reasonable expenses.

We believe further that §180.405(4) is applicable in part to the cause of action alleged in Count 2 of the third amended and supplemental complaint. In this count, as in the second amended and supplemental complaint, the plaintiff asserts that jurisdiction exists under §1332, 1331 and 1337, Title 28 U. S. C. and under §27 of the Securities Exchange Act of 1934, 15 U. S. C. 78aa. Unlike the second amended and supplemental complaint, however, Count 2 charges violation of §10b of that Act, 15 U. S. C. 78j(b) and 14a of that Act, 15 U. S. C. 78n(a), whereas the second amended and supplemental complaint alleged as a basis for [fol. 730] recovery under Federal law violation of §14a only.

In preparation for the hearing of January 2, 1962 on the motion for security directed to the second amended and supplemental complaint, this court came upon the case of *Dann v. Studebaker-Packard Corporation* (C. A. 6, 1961) 288 F. 2d 201. Because we believed that that case could be read to constitute authority for holding that the plaintiff, in seeking damages for violation of §14a, was seeking relief which this court had jurisdiction to grant only under state law, we directed the attention of counsel for the parties to it for their comment. We think it not unreasonable to infer that counsel for the plaintiff thought the *Dann* case persuasive, since it apparently induced him to add an allegation of violation of another section, §10b, when, pursuant to the court's direction that he separate his causes of action, he filed the third amended and supplemental complaint.

The plaintiff contends that because jurisdiction over Count 2 is invoked under Federal law, the Wisconsin security statute is not applicable. It is our belief, however, that since the plaintiff also invokes jurisdiction by reason of diversity and seeks relief which, under the ruling in the

Dann case, is available to him only under state law, that section is applicable.

In the *Dann* case, as in this, the plaintiff complained of violations of §14a of the Securities Exchange Act of 1934, and with respect to such violations relied upon §27 of the Act and §1331, Title 28 U. S. C. for jurisdiction.² In *Dann*, the plaintiff sought a declaration that allegedly improperly solicited proxies were void and demanded certain affirmative relief. The Court, in discussing the type of relief available under Federal law for the alleged violation of federally protected rights stated:

"... we are without jurisdiction to grant the relief sought in this complaint insofar as it seeks to rescind corporate transactions already consummated because of allegedly improperly solicited proxies. In reaching this decision, we are deciding that federal jurisdiction must end with the holding of a contested proxy election, that the right created by Section 14(a) of the Exchange Act is only broad enough to permit consideration of the validity of the proxies solicited in violation thereof, but it is not broad enough to permit the federal courts to determine the consequent effects of the validity or invalidity of said proxies. This latter determination raises issues which concern matters of local law alone."
(Page 214)

and held that federal courts had jurisdiction only to declare either the validity or invalidity of the proxies which the plaintiff claimed were void and that the affirmative relief sought by the plaintiff was not within the jurisdiction of federal courts to grant.

The plaintiff, here, however, also alleges that the defendants violated §10b of that Act, 15 U. S. C. 78j(b). As stated before this allegation was not contained in the second amended and supplemental complaint but was inserted in the third amended and supplemental complaint without authority, after the court had directed counsel's attention

² The plaintiff here has also cited §1337, Title 28 U. S. C. as a jurisdictional basis, but we do not consider this a significant distinction from the *Dann* case.

to the *Dann* case, in an apparent attempt to circumvent the ruling in that case. It is true that it has been generally held that §10b, unlike §14a, creates a civil right of action for damages in persons injured by violation thereof. However, the plaintiff's conclusory allegation that §10b has been violated in Paragraph 3 of Count 2 does not distinguish this case from the *Dann* case. The facts which plaintiff alleges as constituting a violation of §10b, that is, the soliciting of proxies by means of a proxy statement containing false and misleading statements and omissions of fact, constitute, if [fol. 732] true, a violation of §14a and not of §10b. It is §14a and not §10b which protects "the stockholders' right to full and fair disclosure in corporate elections by proxy." (Page 208 of the *Dann* case)

In Count 2 of the complaint presently before us, the plaintiff not only seeks the only relief available to him under Federal law under the ruling of the *Dann* case, with which we agree, that is, a declaration that the proxy statement was false and misleading and the proxies solicited illegal and void as a result of which the merger and agreements pursuant thereto were void under §29b of the Act,³ but also asks for a judgment for damages growing out of violations of the Act. He does not here ask for damages for violation of pre-emptive rights only, but seeks damages resulting from the alleged breach by the defendant Case directors of their fiduciary duties in issuing a false and misleading proxy statement which resulted in approval of the merger. Insofar as he seeks damages in Count 2, the plaintiff is seeking relief available to him only under state law.⁴ While this court has jurisdiction to grant such relief, since the plaintiff here unlike the plaintiff in the *Dann* case has alleged diversity of citizenship, it must be held that the

³ We do not agree with plaintiff's contention that §29b clearly provides for retrospective relief. In our opinion the reasoning of the court in the *Dann* case can be applied to actions alleging invalidity of contracts under §29 where the violations alleged are violations of §14a.

⁴ In this respect, it must be noted that the plaintiff has failed to comply with the court's direction of January 2, 1962, to file a complaint separating his cause of action based on diversity from his cause of action based on claimed violations of Federal law.

cause of action set forth in Count 2, insofar as it seeks relief under state law is one to which the provisions of §180.405(4) apply.

For the above and foregoing reasons we have this day entered an order granting in part the defendant's motion for security.

Dated, Milwaukee, Wisconsin, this 4th day of September, 1962.

Robert E. Tehan, U. S. District Judge.

[fol. 733]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ORDER REQUIRING PLAINTIFF TO GIVE SECURITY, ETC.—
September 4, 1962

The plaintiff having filed his third amended and supplemental complaint herein on January 12, 1962, and the defendant, J. I. Case Company, having on January 26, 1962 moved for an order (1) requiring the plaintiff to give security for reasonable expenses in the sum of \$1,000,000 pursuant to §180.405(4), Wisconsin Statutes, and, (2) pending deposit of such security, staying all further proceedings on behalf of the plaintiff, and, (3) directing that if the plaintiff failed to give security within the time and in the manner directed, the Clerk of Court, upon proof by affidavit by the defendant, J. I. Case Company, that the plaintiff has failed to file security within the time and in [fol. 734] the manner provided shall enter judgment dismissing the action with costs, and said motion having come on for hearing on May 28, 1962, and briefs with respect thereto having been filed, and the court having heard oral argument and considered the briefs and having this day filed its opinion, and being fully informed,

Now, Therefore, It Is Ordered:

1. That the plaintiff be and he is hereby directed to furnish the defendant, J. I. Case Company, on or before September 28, 1962, with security for reasonable expenses, pursuant to §180.405(4), Wisconsin Statutes, including attorneys' fees, in the form of a surety bond of a company duly licensed to write such bond in the State of Wisconsin, in the amount of \$75,000, or cash in said amount, securing the defendant, J. I. Case Company, for its reasonable expenses, including attorneys' fees, in this action and for reasonable expenses including attorneys' fees for which it may become liable by reason of the provision of §180.407, Wisconsin Statutes.

2. That if the plaintiff fails to furnish security within the time and in the amount and manner provided in Paragraph I, judgment dismissing the action as to all the defendants, excepting that portion of the action in which the plaintiff seeks a judgment declaring and adjudging that the proxy statement dated October 15, 1956 was false and misleading in material respects and the proxies solicited illegal and void under §14a of the Securities Exchange Act of 1934 and that the merger between J. I. Case Company and American Tractor Corporation and all agreements made pursuant thereto are void under §29b of said Act for violations of §14a of said Act, will be entered.

3. That if the plaintiff fails to furnish security within the time and in the amount and manner provided in Paragraph I, he shall file a fourth amended and supplemental complaint not later than September 28, 1962, alleging only the cause of action for violation of §14a of the Securities [fol. 735] Exchange Act of 1934 for a declaratory judgment that the proxy statement dated October 15, 1956 was false and misleading in material respects and the proxies solicited illegal and void under §14a of the Securities Exchange Act of 1934 and that the merger between J. I. Case Company and American Tractor Corporation and all agreements made pursuant thereto are void under §29b of said Act for violations of §14a of said Act.

4. That the defendants will answer or otherwise plead to the fourth amended and supplemental complaint, if filed, not later than twenty (20) days after service thereof.

Dated, Milwaukee, Wisconsin, this 4th day of September, 1962.

Robert E. Tehan, U. S. District Judge

[fol. 739]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ORDER STRIKING COMPLAINT, ETC.—October 1, 1962

This matter coming on to be heard on the motion of plaintiff for an order, pursuant to §1292 (b) of the Judicial Code (28 U.S.C.A. §1292(b)) and counsel for the plaintiff having stated in open court that the bond in the amount of \$75,000 as security pursuant to §180.405(4), Wisconsin Statutes as ordered by this Court on September 4, 1962 will not be posted,

And the Court having set forth the reasons why a bond is required in the opinion of this Court dated and filed on September 4, 1962, and being fully informed,

Now, Therefore, It Is Ordered:

1. The Complaint is stricken for failure to post the bond as ordered, as to all of the defendants excepting that portion of the action in which the plaintiff seeks a judgment declaring and adjudging that the proxy statement dated October 15, 1956 was false and misleading in material respects and the proxies solicited illegal and void under §14a of the Securities Exchange Act of 1934 and that the merger between J. I. Case Company and American Tractor Corporation and all agreements made pursuant thereto are

void under §29b of said Act for violations of §14a of said Act.

2. Plaintiff shall file a fourth amended and supplemental complaint not later than 20 days from the date hereof, alleging only the cause of action for violation of §14a of the Securities Exchange Act of 1934, for a declaratory judgment that the proxy statement dated October 15, 1956 was false and misleading in material respects and the proxies solicited illegal and void under §14a of the Securities Exchange Act of 1934 and that the merger between J. I. Case Company and American Tractor Corporation and all agreements made pursuant thereto are void under §29b of said Act for violations of §14a of said Act.

3. The defendants will answer or otherwise plead to the fourth amended and supplemental complaint, not later than twenty (20) days after service thereof.

4. The Court is of the opinion that the within order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

5. It is further ordered that proceedings in this court shall be and hereby are stayed pending disposition of the appeal by the Court of Appeals.

Dated, Milwaukee, Wisconsin, this 1st day of October, 1962.

Enter:

Robert E. Tehan, U. S. District Judge.

[fol. 741]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

No. 13947

Appeal from the United States District Court for the
Eastern District of Wisconsin.

CARL H. BORAK, Plaintiff-Appellant,

vs.

J. I. CASE COMPANY, et al., Defendants-Appellees.

ORDER GRANTING LEAVE TO APPEAL—October 24, 1962

On consideration of the petition of the plaintiff, Carl H. Borak, for leave to appeal under Section 1292(b), Title 28 U.S.C.A., from an interlocutory order of the United States District Court for the Eastern District of Wisconsin in Civil Action No. 56-C-247, entered on October 1, 1962; brief in support of petition; appendices to petition; and defendants' verified answer to said petition;

It Is Ordered by the Court that said petition of Carl H. Borak be, and the same is hereby granted, and that leave to appeal from such interlocutory order of October 1, 1962, is hereby allowed.

It Is Further Ordered that a certified copy of this order be transmitted forthwith by the Clerk of this Court to the Clerk of the United States District Court for the Eastern District of Wisconsin.

A True Copy:

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit.

Teste:

[fol. 742]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13947 September Term, 1962 April Session, 1963

On Appeal from the United States District Court for
the Eastern District of Wisconsin.

CARL H. BORAK, for and on behalf of himself and all of the
other common stockholders of J. I. CASE COMPANY who
are similarly situated to him, Plaintiff-Appellant,

v.

J. I. CASE COMPANY, a Wisconsin corporation, MARC B.
ROJTMAN, individually and as representative of all
AMERICAN TRACTOR CORPORATION shareholders who re-
ceived J. I. CASE COMPANY common and second pre-
ferred stock in the merger herein referred to, and their
successors in interest, JOHN B. ELLIOTT, Executor of the
Estate of Edward L. Elliott, deceased, A. O. CHOATE,
WILLIAM EWING, L. R. CLAUSEN, H. S. STURGIS, JOHN T.
BROWN, H. G. BARR, WILLIAM J. GREDE, E. P. HAMILTON,
WILLIAM B. PETERS, MENTOR KRAUS, and NATHANIEL C.
BEEBER, individually and as representative of all holders
of common stock purchase warrants issued by American
Tractor Corporation to the purchasers of its preferred
stock, Series 56-1, Defendants-Appellees. °

OPINION—May 29, 1963

Before DUFFY and KILEY, *Circuit Judges*, and² MERGER,
District Judge.

MERCER, *District Judge*. Plaintiff, Carl H. Borak, the
holder of 2,000 common shares of J. I. Case Company,
hereinafter referred to as Case, commenced this suit below

on November 13, 1956, by filing his complaint in which he [fol. 743] sought to have the then proposed plan of merger between Case and American Tractor Corporation, hereinafter ATC, declared illegal and void and to have Case and its officers and directors enjoined from taking any action to consummate the plan. Injunctive relief was denied. Subsequently plaintiff has filed three amended and supplemental complaints, the third of which was filed on January 12, 1962. It is that complaint which gives rise to this appeal. That complaint is in two counts, the first of which is based upon the laws of the state of Wisconsin and invokes the court's jurisdiction on the basis of diversity of citizenship. The second count purported to allege violations of Section 10(b) and 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. A. 78j(b), 78n(a), and the jurisdiction of the court over that count is asserted to exist by reason of the provisions of Section 1331 and Section 1337 of the Judicial Code, 28 U. S. C. A. 1331, 1337, and Section 27 of the Securities Exchange Act. 15 U. S. C. A. 78aa.¹

After the third amended complaint was filed, the defendants² filed a motion for an order to compel plaintiff to

¹ "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." 28 U. S. C. A. 1331(a).

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U. S. C. A. 1337.

"The district courts of the United States * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. * * *" 15 U. S. C. A. 78aa.

² The identity of persons who have from time to time been named defendants in this suit has varied in the several amended complaints. Since the precise identity of the persons who are defendants has no particular bearing upon the issues presented on this appeal, the term "defendants", when used in this opinion, is a reference to all persons who were so named at any particular stage of the proceedings below as the context may require.

provide security for expenses incurred and to be incurred by the defendants in defending the suit to comply with the provisions of, Wis. Stat. § 180.405(4).³ After a hearing [fol. 744] upon that motion the court filed an opinion holding that the only cause of action stated in count 1 of the complaint was derivative in nature and that the Wisconsin security for expense statute applied thereto, that count 2 does not state a cause of action under Section 10b of the Act,⁴ that the only relief which it had jurisdiction to grant under Section 14(a)⁵ of the Act was a declaratory judgment as to the validity or invalidity of the proxies involved in the suit, and that, insofar as count 2 prayed relief other than such a declaratory judgment, that count also stated a derivative cause of action under Wisconsin law, which was

³ "In any action brought in the right of any foreign or domestic corporation by the holder or holders of less than 3 per cent of any class of shares issued and outstanding, the defendants shall be entitled on application to the court to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees. * * * " Wis. Stat. 1961 § 180.405(4).

This statute is sometimes in the opinion referred to as "the Wisconsin statute", without more precise description thereof.

⁴ "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

"(a) * * *

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. A. 78j(b).

⁵ "(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security * * * registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. A. 78n(a).

subject to the provisions of the Wisconsin security for expense statute. Accordingly, the court ordered plaintiff to furnish a bond in the amount of \$75,000.00, conditioned for the payment of expenses to be incurred by the defendants in defending the suit. Upon plaintiff's refusal to provide security in accordance with that order, the court ordered that count 1 of the complaint be dismissed and that count 2 thereof likewise be dismissed, except to the extent that that count might be construed as a suit under Section 14(a) for a declaratory judgment as to the validity of the proxies solicited for the Case-ATC merger. This interlocutory appeal was then taken pursuant to the provisions of 28 U. S. C. A. 1292(b) and the order of this court, entered October 24, 1962, granting to plaintiff leave to appeal.

Three issues are presented on this appeal. First; did the court below err in its conclusion that the cause of action stated in count 1 of the complaint was derivative in nature and therefore subject to the provisions of Wisconsin security for expense statute? Second, did the court below err [fol. 745] in its holding that the Wisconsin statute applies to count 2 of the complaint insofar as that count sought retrospective relief? Third, did the court below err in holding that count 2 of the complaint did not state a cause of action under Section 10(b) of the Securities Exchange Act?

With respect to count 1 of the complaint, the only issue before us for decision is the question whether the court correctly held the provisions of the Wisconsin statute applicable to plaintiff's cause of action. As the court recognized in its opinion, that issue depends upon a determination whether the allegations of the complaint state a derivative cause of action brought on behalf of the corporation, or a primary cause of action to redress an injury to plaintiff as a Case stockholder. If the cause of action stated is derivative, then the statute was properly applied. If it is not derivative, but is a primary right in the plaintiff, the statute has no application.

Plaintiff's first amended and supplemental complaint asserted a derivative cause of action on behalf of the corporation. After the court ruled that the Wisconsin statute

applied to the case and ordered plaintiff to furnish bond in the amount of \$75,000.00, plaintiff amended his complaint in an attempt to allege the denial of his preemptive right to participate in the issuance of Case shares and an injury to himself, individually, as a shareholder of Case. He supported that allegation by the reallegation of essentially the same material facts which were alleged in the first amended complaint.*

In holding the Wisconsin statute applicable to count 1 of the third amended complaint, the court below said, in part:

"After reviewing the allegations of count 1, it is clear to us that the plaintiff still complains of fraud and self-dealing, failure of directors to perform their fiduciary duties, etc., as in the first amended and supplemental complaint, and seeks redress for the alleged wrong in behalf of the corporation. He does not allege any wrong to himself different from that suffered by other stockholders, nor limit the relief sought to damages sustained by reason of loss of pre-emptive rights. [fol. 746] He is concerned in our opinion not with the fact that stock was issued to others without being first offered to Case stockholders but with the fact that stock was issued for an allegedly insufficient consideration. We therefore hold that § 180.405(4) was applicable, that count 1 set forth a derivative cause of action and that the plaintiff must furnish security for reasonable expenses."

The principle that directors of a corporation owe a fiduciary duty to the corporation and the stockholders thereof, to deal honestly in corporate affairs is hornbook law requiring no citation of authority. As it affects the rights of shareholders, that duty has a two-fold aspect. Except where the right has been abolished by statute, or, where

* Plaintiff filed this suit as a class action on behalf of himself and all other Case shareholders who are similarly situated. For convenience in this opinion, however, the singular "plaintiff" is used, with no reference being made to the class which he purports to represent, except where the context otherwise requires.

permissible, by provision in a corporate charter, the shareholders of a corporation have a preemptive right to participate ratably in the issuance of new shares of the corporation if they desire so to do. E.g., *Luther v. C. J. Luther Company*, 118 Wis. 112, 94 N. W. 69; *Spaulding v. North M. & T. S. Co.*, 106 Wis. 481, 494, 81 N. W. 1064; *Hammer v. Werner*, 239 App. Div. 38, 265 N. Y. S. 172. In addition to the preemptive right, the directors and officers of a corporation owe a fiduciary duty to not use their positions for their own personal advantage, or for the advantage of others, to the detriment of the interests of the stockholders of the corporation. E.g., *Luther v. C. J. Luther Co.*, *supra*, 94 N. W. at 72; *Hammer v. Werner*, *supra*; *Schwab v. Schwab-Wilson Mach. Corp., Ltd.*, 13 Cal. App. 2d 1, 55 P. 2d 1268. A breach of the duty owed to the shareholders of a corporation in that respect gives rise to a cause of action by the shareholders in their own right. *Ibid.* Count 1 of this complaint must be measured in the light of those established legal principles.

We are indebted to Judge Tehan for the following summary of the allegations of count 1 of the complaint which, with slight embellishment, is taken verbatim from his memorandum.

Count 1 of the complaint alleges that plaintiff, the owner of 2,000 shares of Case common stock acquired prior to the merger complained of, sues in a representative capacity on behalf of himself and all other common stockholders prior to the merger except those participating in or cognizant of the wrongdoing alleged. In addition to Case, he joins as defendants certain of its directors and former [fol. 747] directors, some of whom are also officers and former officers, and the executor of the estate of a deceased director. Defendants who are now directors of Case are sued individually and as directors, the defendant Rojzman is sued individually and as representative of American Tractor Corporation shareholders receiving Case stock as the result of the merger between Case and American Tractor Corporation, and the defendant Beeber is also sued, individually and as representative of holders of certain purchase warrants. In Count 1, the plaintiff alleges substantially as follows: In October 1956, Case formally

announced to its shareholders a proposed plan of merger between Case and American Tractor Corporation and proposed stock option amendments, which were purportedly approved by Case shareholders on November 15, 1956. The merger was purportedly consummated on January 10, 1957. Both the merger and stock option plan were effectuated by illegal and fraudulent acts and illegally deprived the plaintiff and other shareholders similarly situated of their preemptive right—rights which the plaintiff here seeks to enforce. Under the merger and plan, 648,852 shares of common stock and 1,197,704 shares of second preferred stock were set aside or issued without granting the plaintiff's class their pre-emptive rights to subscribe thereto.

The plaintiff then describes in some detail the acts which he believes to have resulted in a violation of the preemptive rights of Case shareholders as follows: In 1954, Elliott's company and a syndicate headed by him acquired 170,000 shares of American Tractor Corporation stock. Elliott violated the Securities Act of 1933 and regulations thereunder in connection with that stock and the sale of a portion thereof. Thereafter, the market price of American Tractor Corporation stock, most of which was held by Elliott, Rojzman and their associates, began an unreasonable rise, due to illegal manipulations, which manipulations Elliott was aware of prior to the merger. Rojzman, Brown, Grede and the Case management also knew prior to the merger that the market price of ATC stock was achieved illegally and artificially. Since the merger one person has been found guilty in another district court of manipulating ATC stock from May, 1955 to February, 1956; and Gilligan, Will and Company, formerly defendant in this cause and the specialist in ATC stock on the American Stock Exchange was found by the Securities and Exchange Commission to have engaged in improper and illegal [fol. 748] activities while specialist with respect to ATC stock.

Case directors violated Wisconsin law and breached their fiduciary duties to the shareholders in approving the merger by including future earnings of American Tractor Corporation and future services of its officials as partial consideration for issuance of Case stock, by agreeing to issue Case

stock at less than par value, by failing to evaluate properly the American Tractor Corporation assets acquired and paying an excessive price for American Tractor Corporation, by over-valuing American Tractor Corporation's and undervaluing Case's earnings and book value resulting in a fraud on Case shareholders, by relying on market price of American Tractor Corporation stock as a measure of American Tractor Corporation's value, by relying on American Tractor Corporation's own appraisal of its physical assets and failing to examine that appraisal, by considering future earnings as an element of value and by failing to recognize the necessity of future investments as part of the cost of the merger.

Case directors breached their fiduciary duties by approving and issuing a letter and proxy statement of October 15, 1956, prior to the meeting at which the merger was approved which contained numerous material omissions and false and misleading statements relied upon by Case shareholders in approving the merger and without which the merger would not have been approved. Three pages of the complaint are given over to instances thereof.

For example, it is alleged that defendants failed to disclose that the total purchase price of ATC exceeded \$17,000,000, that the book value of Case common stock was \$36.00 and ATC's only \$1.15, that persons who negotiated the merger were recipients of stock options; and that one of the director defendants, as a supplier, would receive a substantial increase in business as a result of the merger, the merger was fair because in accordance with the comparative market prices of the two stocks, and the Case common shareholders would not be adversely affected when in fact their proportionate interest in the earnings, book value and voting power were seriously diluted.

Both the Case and American Tractor Corporation management groups were guilty of self dealing in connection with the plan and merger.

[fol. 749]. The conduct of the defendants, the plaintiff claims, constitutes actual or constructive fraud on himself and other shareholders similarly situated depriving them of their pre-emptive rights. He claims that if they had

been permitted to purchase stock issued in the merger on the same basis as American Tractor Corporation shareholders, they could have obtained one-fourth share of common stock and one-half share of second preferred stock for \$2.20 for each share of Case common stock held by them at the time of the merger.

In Paragraph 19 of Count 1 of his complaint, the plaintiff alleges facts occurring after the merger particularly, that Brown, Grede, Rojtnan and other principal defendants were no longer with Case and that Case was nearly bankrupt, in Paragraph 20 he alleges that the class he represents has been irreparably damaged by failure to recognize pre-emptive rights, and in his prayer for relief he asks that the court enter judgment in favor of the class he represents and against Case directors who approved the merger and all defendants the court finds responsible for the merger and the consequent deprivation of pre-emptive rights in an amount to be determined and/or that the court enter a decree directing Case to issue to the class he represents such securities of Case as the court deems necessary to compensate the class for violation of pre-emptive rights, and asks for such other relief as equity shall require.

Judge Tehan was correct in his conclusion that the facts alleged in count 1 are basically consistent with the statement of a derivative cause of action to redress a wrong to the corporation, but that conclusion does not resolve the issue which is before us. Those same facts may also state a primary cause of action by a stockholder for relief from injury to himself resulting from unlawful and fraudulent practice. *Hammer v. Werner*, 239 App. Div. 38, 256 N. Y. S. 172; *Schwab v. Schwab-Wilson Mach. Corp., Ltd.*, 13 Cal. App. 2d 1, 55 P. 2d 1268; *Hagan v. Superior Court of Los Angeles County*, 2 Cal. Retr. 288, 348 P. 2d 896, 898.

In *Hagan*, for example, shareholders of a corporation intervened in a suit for dissolution of the corporation, alleging that the directors who had filed the suit for dissolution refused to recognize them as shareholders of the corporation, and that some of the directors had been parties to a scheme to fraudulently divert funds from the corporation to the detriment of the rights of the shareholders. The [fol. 750] trial court ordered the plaintiffs to provide se-

security for costs of the suit pursuant to the provisions of the California Corporation Code. The shareholders then filed a prohibition suit in the California Supreme Court alleging that the trial court had threatened them with contempt if they sought to take any further action in the dissolution suit without first complying with the order to provide security for costs. In granting the writ of prohibition, the court held, 348 P. 2d at 898, that the security statute did not apply to the intervening shareholders who were seeking to vindicate their own rights, even though their complaint in intervention alleged facts which would also give rise to a cause of action by the corporation.

We think the trial court failed to recognize the principle that the same allegations of fact might support either a derivative suit or an individual cause of action by shareholders. We think count 1 of the complaint adequately states a cause of action for the redress of rights individual to the Case stockholders.⁷

Defendants' contentions that plaintiff is affected by the circumstances alleged in the same way as all stockholders of Case are affected, and that his suit is therefore, derivative, fails to take into account the realities of the circumstances alleged and the clear indication to the contrary of the Wisconsin decisions. If the allegations of the complaint are true, as we must assume them to be for present purposes, two separate categories of Case shareholders must be recognized, namely, those shareholders who participated in the practices alleged and benefited by the merger and related agreements and those shareholders who were not participants, with the result, as it is alleged, that their proportionate interest in the corporation was diluted. The former are expressly excluded from the class which plaintiff purports to represent. In this respect, this complaint cannot be distinguished from the complaint in *Luther v. C. J. Luther Co.*, *supra*, in which a part of the

⁷ Our conclusion is based upon the impression of the complaint as a whole, and it should not be construed as precluding the possibility that count 1 might contain specific allegations which are consistent with a derivative cause, only, and which are subject to being stricken as surplusage.

shareholders were aligned as plaintiffs against others as defendants.*

[fol. 751] One further contention of the defendants must be noted. They argue, citing *Dousman v. The Wisconsin & L. S. M. & S. Co.*, 40 Wis. 418, 422, that an individual cause of action to redress a violation of the rights of shareholders must be brought against the corporation alone. That position is not valid. In most of the cases in which courts have taken jurisdiction to vindicate the rights of shareholders, the suit has been against the corporation involved and its directors or other persons alleged to have been responsible for the injury. E.g., *Luther v. C. J. Luther Co.*, *supra*; *Hammer v. Werner*, *supra*; *Schwab v. Schwab-Wilson Mach. Corp., Ltd.*, *supra*. A director of a corporation acts as a fiduciary not only to the corporation but also to the stockholders, and the essence of a cause of action by a stockholder, based upon allegations of fraudulent acts by a director, is not the fraud against the corporation, but the fraud of the director as it affects the stockholders. *Schwab v. Schwab-Wilson Mach. Corp. Ltd.*, *supra*, 55 P. 2d at 1269. While *Dousman* does contain statements which tend to support defendants' argument, such statements must be read in the light of the fact that only the corporation was named as a defendant in that suit. Moreover, to the extent that *Dousman* is authority for the proposition that a suit by an individual stockholder lies only against the corporation, its weight as authority is certainly undermined, if not overruled, by the later decisions in *Luther* and other Wisconsin cases.

We hold that count 1 of the complaint does state a cause of action on behalf of the stockholders individually, and that the court erred in holding that the provisions of the Wisconsin statute are applicable thereto.

* Closely related to that contention is the defendants' argument that a class suit will not lie for the redress of shareholders' rights. However, that argument does not affect the merit of the complaint as stating a primary cause of action, and we express no opinion as to the validity of the argument. If the argument is valid, it may be presented to the court below upon a proper motion directed against the complaint.

In considering the correctness of the court's decision as it relates to count 2 of the complaint,⁹ an analysis of the court's opinion in the light of the procedural history of the case places the issues in perspective. The plaintiff's original complaint and his first amended complaint were based upon allegations of violations of state law, federal jurisdiction being predicated upon diversity of citizenship. After the court had held that the Wisconsin statute applied [fol. 752] to the cause of action, plaintiff obtained leave to file his second amended complaint alleging both a violation of state law and a violation of the Securities Exchange Act. That complaint set forth both of those alternative causes of action in a single count, alleging, insofar as the Securities Exchange Act was concerned, a violation of Section 14(a). On January 2, 1962, upon a hearing on defendants' motion to compel a bond for expenses under the Wisconsin statute, the court ordered that plaintiff file a third amended complaint stating, in separate counts, the alternative causes of action under state law and under Section 14(a). At the same time, the court asked the plaintiff to consider the application to his cause of action of the decision in *Dann v. Studebaker-Packard Corp.*, 6 Cir., 288 F. 2d 201.

Thereafter the third amended and supplemental complaint was filed. As the jurisdictional basis for count 2, plaintiff asserted diversity of citizenship between the parties, Section 27 of the Securities Exchange Act and Sections 1331 and 1337 of the Judicial Code. 28 U. S. C. A. 1331, 1337.

By reference, plaintiff realleged substantially all of the charging paragraphs contained in count 1 of the complaint. He alleged that the merger between Case and ATC was consummated early in 1957, following its approval by a vote of two-thirds of the outstanding common and preferred shares of Case at a special stockholders meeting held for that purpose. The count alleged that the proxy solicitation material issued by the defendants prior to that special meeting was false and misleading and its use con-

⁹ We are aided in our consideration of this issue by an exhaustive brief filed by the Securities and Exchange Commission as *amicus curiae*.

stituted a violation of Section 14(a) of the Act and the SEC Rules promulgated thereunder. 17 CFR 240.14a-3, 140.14a-9. The theory of the cause of action stated in that count was the contention that the Case-ATC merger and stock option agreements approved by the vote of proxies given by shareholders of Case in response to allegedly unlawful proxy solicitation material were void agreements under the provisions of Section 29(b) of the Act, 15 U. S. C. A. 78cc(b). Plaintiffs sought relief declaring that the proxy solicitation material was false and misleading, that the proxies solicited thereby were illegal and void, and that the merger and all agreements entered into pursuant thereto were void. He also prayed damages for injuries sustained by himself and all other stockholders similarly situated which grew out of violation of the Act, and such other and further relief as equity might require. [fol. 753] In ruling upon the defendants' motion for security and in holding that the Wisconsin statute applied in part to count 2 thereof, the court relied upon the decision in the *Dann* case. Thus the court held that federal jurisdiction in a civil action for violation of the provisions of Section 14(a) is limited to the granting of prospective relief, i.e., a declaration of the validity of the proxy solicitation material as the merits of the cause might require. The court further held that count 2, insofar as it alleged a cause of action for damages and relief other than a declaratory judgment of the invalidity of the proxy solicitation material, was a suit arising under state law to which the Wisconsin statute applied. Finally, the court held that the allegations of count 2 did not state a cause of action for violation of Section 10(b) of the Act.

We think the court correctly held that Section 10(b) of the Act has no application to the facts alleged in the complaint at bar. That section and Rule 10(b)-5, promulgated thereunder, 17 CFR 240.10b-5, prohibits the use of manipulative and deceptive devices in connection with the purchase or sale of securities, and afford a basis for a civil remedy for damages and other relief to persons injured by the use of such practices. E.g., *Ellis v. Carter*, 9 Cir., 291 F. 2d 270; *Smith v. Bear*, 2 Cir., 237 F. 2d 79; *Hooper v. Mountain States Securities Corp.*, 5 Cir., 282 F. 2d 195;

cert. denied, 365 U. S. 814. We need not consider whether misleading proxy material may, under any circumstances, constitute a manipulative and deceptive device within the prohibition of that Section, and we express no opinion upon that subject. We hold only that the facts alleged in this complaint directly invoke the provisions of Section 14(a), and that only sheer speculation can bring the provisions of 10(b) into play.¹⁰

[fol. 754] The critical issue with respect to the decision below as it relates to count 2 is the question whether the trial court correctly held that federal jurisdiction in a civil cause of action for enforcement of the provisions of Section 14(a) is limited to declaratory relief. Since the court below relied in its decision on the *Dann* case, we approach that issue from an analysis of *Dann*.

The complaint in *Dann*, filed by a stockholder of Studebaker, alleged the waste and dissipation of Studebaker

¹⁰ The second amended complaint alleged a violation of Section 14(a) only. After plaintiff was directed to file a third amended complaint stating his alternative causes of action in separate counts, and after plaintiff had been requested to consider the impact of the *Dann* decision upon his complaint, he filed his third amended complaint in which he alleged the violation of 10(b) as well as 14(a). We think it not unreasonable to infer, as Judge Tehan did, that 10(b) was alleged in an attempt to circumvent *Dann*.

It also appears that count 2 was muddled by the allegations of diversity of citizenship for the same purpose. In the reasoning of the *Dann* opinion leading to the conclusion that there was no jurisdiction to award the relief prayed upon the merits of the complaint, the court observed that there was no allegation of diversity of citizenship to support jurisdiction over what the court construed to be a cause arising under state law. Plaintiff argues, or implies, that the court predicated its decision that there was no federal jurisdiction upon the lack of diversity allegations. He seeks to distinguish *Dann* from this complaint upon that basis. His analysis of *Dann* is false in that regard. The court had held that there was no jurisdiction under Section 27 of the Securities Act, and no cause of action arising under a statute of the United States. Its discussion of diversity was directed to a determination whether the allegations of the complaint would sustain federal jurisdiction to decide questions of state law. If there be jurisdiction under Section 27, that jurisdiction is neither enlarged nor diminished by the existence, or non-existence, of diversity of citizenship.

The diversity allegations of count 2 are wholly surplusage.

assets growing out of a fraud upon the shareholders of Studebaker, which allegedly resulted from the use of false and misleading proxy solicitation materials. The complaint predicated jurisdiction upon the provisions of Section 27 of the Act and Section 1331 of the Judicial Code. The complaint prayed that the court declare void proxies solicited in violation of the provisions of Section 14(a), and, in the event that the court found that such void proxies had controlled the vote of Studebaker stockholders approving the arrangement between Studebaker and Curtiss-Wright Corporation of which complaint was made, that the court would, by its decree, restore Studebaker to its economic condition which had obtained prior to consummation of the arrangement with Curtiss.

The trial court dismissed the complaint. The Court of Appeals reversed, holding that a cause of action was stated under Section 14(a). Thus the court held that a civil suit by a shareholder will lie to enforce the provisions of that section. The court, however, having determined that a federal cause of action was stated by the complaint, then addressed itself to the question whether it had jurisdiction to grant the relief sought in the complaint. 288 F. 2d at 210-215. In reliance upon language contained in the opinion in *Gully v. First National Bank*, 299 U. S. 109, 117-118, the court concluded that federal jurisdiction under Section 14(a) is limited to declaratory relief related to the validity or invalidity of proxies obtained in violation of the Act. Thus the court said, 288 F. 2d at 214:

[fol. 755] " . . . In reaching this decision, we are deciding that federal jurisdiction must end with the holding of a contested proxy election, that the right created by Section 14(a) of the Exchange Act is only broad enough to permit consideration of the *validity* of the proxies solicited in violation thereof, but it is not broad enough to permit the federal courts to determine the consequent *effects* of the validity or invalidity of said proxies."

Finally, the court held that the right to damages and other retrospective relief arising out of a violation of

14(a) is a question of state law, because such a remedy requires the interpretation and application of state, as well as federal law.

We respectfully disagree with the decision in *Dann* for two reasons. First, the court failed to note a critical distinction between the jurisdictional facts of *Gully* and *Dann*, namely, that a federal statute was involved only collaterally in the former, whereas the whole right of action in the latter was derived from a federal statute.

Gully was a suit by a state to collect local taxes levied against a national bank. The only ground upon which federal jurisdiction could be claimed was the fact that the bank had been chartered under an Act of Congress. Upon that factual background, the court held that the case arose under state law, uninfluenced by the fact that a federal statute had a collateral bearing thereon.¹¹

By contrast, in *Dann* the complaint alleged a direct violation of a federal statute. Thus the controversy is a basic one requiring the interpretation and application of a federal statute. The rationale of *Gully* has no bearing upon the jurisdictional question.

Second, in our opinion, the court in its reasoning failed to distinguish between the question of jurisdiction and the question upon the merits of the case whether the plaintiffs were entitled to the relief which they sought. See, concurring opinion, Miller, C. J. 288 F. 2d at 217, 218.

Section 14(a) prohibits the solicitation of proxies of securities listed on a national exchange in violation of SEC Rules promulgated thereunder. Rule 14a-9 prohibits the use of false and misleading statements with respect to any material fact or the omission of material facts which [fol. 756] would render any statement contained in a proxy solicitation false or misleading. 17 CFR 240.14a-9.

Section 27 of the Act vests exclusive jurisdiction in the United States District Courts over violations of the Act or SEC Rules and over all suits in equity or actions at law brought to enforce any liability or duty created by the Act or SEC Rules.

¹¹ See also, *Chicago & N. W. Ry. Co. v. Toledo, P. & W. R. Co.*, S. D. Ill., — F. Supp. —.

The obvious purpose of Section 14(a) is the protection of the right of shareholders to a full and fair disclosure of all material facts which affect corporate elections by proxy. *Dann v. Studebaker-Packard Corp.*, *supra*, at 208. See also *SEC v. Transamerica Corp.*, 3 Cir., 163 F. 2d 511, 518, cert. denied 332 U. S. 847. For the achievement of that purpose, the jurisdiction conferred by Section 27 must be broad enough to effectively protect that right. Thus, it is said in *Bell v. Hood*, 327 U. S. 678, 684, that federal courts have the power, under a general grant of jurisdiction to enforce a federal statute, to grant all of the relief which may be commensurate with the effective enforcement of the statute and the protection of rights created thereby, notwithstanding the failure of the statute to specify the remedies which may be employed.

Indeed, Section 27 has many times been so construed in cases arising under Section 10(b), the courts holding that the jurisdictional grant includes the power to award damages and other retrospective relief. E.g., *Ellis v. Carter*, 9 Cir., 291 F. 2d 270; *Hooper v. Mountain States Securities Corp.*, 5 Cir., 282 F. 2d 195, cert. denied 365 U. S. 814; *Smith v. Bear*, 2 Cir., 237 F. 2d 79; *Fischman v. Raytheon Mfg. Co.*, 2 Cir., 188 F. 2d 783; *Kohler v. Kohler Co.*, E. D. Wis., 208 F. Supp. 808, 820. In at least two cases decided prior to *Dann*, the courts assumed the existence of power under Section 27 to award retrospective relief by whatever remedy might be necessary in a particular case to protect the rights created under Section 14(a). *SEC v. Transamerica Corp.*, 3 Cir., 163 F. 2d 511, 518, cert. denied 332 U. S. 847; *Mack v. Mishkin*, S. D. N. Y., 172 F. Supp. 885, 889. *Contra*, *Howard v. Furst*, S. D. N. Y., 142 F. Supp. 507, *aff'd* on other grounds, 2 Cir., 238 F. 2d 790, cert. denied 353 U. S. 937.

In *Deckert v. Independence Shares Corp.*, 311 U. S. 282, the Court, applying the provisions of the Securities Act of 1933, which were similar to the provisions of Section 27, held that purchasers of securities sold in violation of the [fol. 757] Act had a civil cause of action, not only against the vendor of the securities and other persons specified in Section 12(a) of the Act, but also against a third person having assets of the vendor in its possession. The court

said, in part, 311 U. S. at 288: "The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case * * *."

In other cases the courts have held a general grant of jurisdiction to the district courts to enforce a federal statute effective to authorize the appointment of a receiver in a suit for violation of the Investment Company Act of 1940,¹² *Aldred Investment Trust v. SEC*, 1 Cir., 151 F. 2d 254, 261, cert. denied 326 U. S. 795, a decree of restitution of rents collected in excess of the maximum rents permissible under the Emergency Price Control Act of 1942,¹³ *Porter v. Warner Holding Company*, 328 U. S. 395, a decree of restitution for loss of wages resulting from a violation of the Fair Labor Standards Act of 1938,¹⁴ *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 291, and a decree of divestiture of property held in violation of Sections 1 and 2 of the Sherman Act.¹⁵ *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110.

We think the same principle must be applied in determining the scope of federal jurisdiction for the protection of rights created by Section 14(a). We hold that the court below has jurisdiction under Section 27 to award damages or such other retrospective relief to the plaintiff as the merits of the controversy may require.

The court below erred in holding the Wisconsin statute applicable to count 2. *McClure v. Borne Chemical Co.*, 3 Cir., 292 F. 2d 824, cert. denied 368 U. S. 939; *Fielding v. Allen*, 2 Cir., 181 F. 2d 163, cert. denied, *sub nom. Ogden Corp. v. Fielding*, 340 U. S. 817.

[fol. 758] The order dismissing plaintiff's third amended complaint is reversed, and the cause is remanded to the court below for further proceedings consistent with this opinion.

¹² 15 U. S. C. A. 80a-35.

¹³ 50 App. U. S. C. A. 925(a).

¹⁴ 29 U. S. C. A. 215(a), 217.

¹⁵ 15 U. S. C. A. 1, 2.

[fol. 759]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before Hon. F. Ryan Duffy, Circuit Judge, Hon. Roger J. Kiley, Circuit Judge, Hon. Frederick O. Mercer, District Judge.

No. 13947

CARL H. BORAK, Plaintiff-Appellant,

vs.

J. I. CASE COMPANY, et al., Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

JUDGMENT—May 29, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court dismissing plaintiff's third amended complaint in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby, Remanded to the said District Court for further proceedings consistent with the opinion of this Court filed this day.

[fol. 760] CLERK'S CERTIFICATE (omitted in printing).

[fol. 761]

SUPREME COURT OF THE UNITED STATES

No. 402, October Term, 1963

J. I. CASE COMPANY, et al., Petitioners,

VS.

CARL H. BORAK, etc.

ORDER ALLOWING CERTIORARI—November 12, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

AUG 26 1963

Supreme Court of the United States DAVIS, CLERK

OCTOBER TERM, 1963

**J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN,
L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON, WM. B.
PETERS, and MARC B. ROJTMAN,**

Petitioners,

vs.

**CARL H. BORAK, for and on behalf of himself and all of the
other common stockholders of J. I. Case Company who are
similarly situated to him,**

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

**J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN,
L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON, WM. B.
PETERS, and MARC B. ROJTMAN,**

Petitioners,

vs.

**CARL H. BORAK, for and on behalf of himself and all of the
other common stockholders of J. I. Case Company who are
similarly situated to him,**

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

To the Justices of the Supreme Court of the United States:

J.I. Case Company, Harry G. Barr, John T. Brown, L.R. Clausen, Wm. J. Grede, E.P. Hamilton, Wm. B. Peters and Marc B. Rojzman, Petitioners herein, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 29, 1963, reversing the District Court's Order of October 1, 1962, which dismissed Respondent's Third Amended and Supplemental Complaint for failure

to post security for expenses in accordance with Sec. 180.405(4), Wis. Stats. 1961, as previously ordered by the trial court.

Opinions Below

The opinion of the District Court for the Eastern District of Wisconsin is not reported, although it is set forth in full in the Record herein at pp. 27-41. The opinion of the Court of Appeals for the Seventh Circuit is reported at 317 F(2d) 838.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on May 29, 1963, and a copy thereof is appended to this petition in the Appendix at pp. 15-35. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254 (1).

Questions Presented

The question presented here, which has received diametrically opposing decisions in the United States Court of Appeals for the Second and Sixth Circuits (from that rendered here by the Seventh), involves an important matter arising under the Securities Exchange Act of 1934, 15 USC § 78a *et seq.* (hereinafter, the "Act") having nationwide effect on corporate action carried out through the use of allegedly misleading proxy statements filed with the Securities and Exchange Commission. The question is:

Whether Sec. 27 of the Act grants a Federal cause of action for rescission or damages to a corporate stockholder in respect of a consummated merger which was authorized pursuant to the use of a proxy statement alleged to have contained misleading statements violative of § 14(a) of the Act.

Proceedings Below

This action grows out of the 1956 merger of American Tractor Corporation ("ATC") into J. I. Case Company ("Case"). In the Third Amended and Supplemental Complaint, which is the one before this Court, a stockholder on his own behalf and on behalf of others similarly situated attempts to state two causes of action.

COUNT I claims jurisdiction by reason of diversity of citizenship, 28 USC § 1332, and alleges fraud, mismanagement and self-dealing by the then Case directors and others, and asks judgment in favor of the plaintiff and those similarly situated and against such of Case directors and others as the Court may find responsible for the merger, for damages caused by an alleged deprivation of preemptive rights, or a decree directing defendant Case to issue securities to the plaintiff and those similarly situated to compensate them for the alleged loss of such rights.

COUNT II claims jurisdiction by reason of diversity of citizenship, 28 USC § 1332, the Securities Exchange Act, 15 USC § 78 aa, controversy arising under the laws of the United States, 28 USC § 1331, and the involvement of federal laws regulating commerce, 28 USC § 1337. It alleges violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 (hereinafter the "Act") and Rules promulgated thereunder and seeks judgment declaring the proxies solicited to be illegal and void, the merger void and/or damages for such alleged violations.

The District Court granted defendants' motion for security for expenses pursuant to Sec. 180.405(4), Wis. Stats., 1961, on the grounds that:

As to Count I, the plaintiff had unsuccessfully amended his Complaint to change the gravamen of

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the cause from a derivative action to a primary cause of action against the Company as well as its directors; and

As to Count II, the plaintiff had set forth a derivative action and despite the references to violations of federal law the gravamen of the cause was ruled by state law and the state security for expense statute was applicable.

On plaintiff's failure to post security the court entered an order striking the complaint and directed plaintiff to file a fourth amended and supplemental complaint limited to seeking a declaratory judgment as to whether or not proxies solicited in respect to the merger were void under Sec. 14(a) and the merger was void under Sec. 29(b) of the Act.

On appeal by plaintiff the Circuit Court of Appeals reversed the District Court and held that Count I set forth a primary cause of action against the Company rather than derivative on behalf of the Company and that Count II stated a cause of action arising under federal law to which the state security for expense statute did not apply and that the District Court could award damages or other retrospective relief thereunder.

Statutes, Federal Rules, and Regulations Involved

The pertinent portions of the Securities Exchange Act, 15 U.S.C., § 78a, *et seq.*, and Rule 14(a), 17 CFR 240.14a, are set forth in the Appendix at pp. 36-43.

STATEMENT

On October 15, 1956, after previous conferences and filing with the Securities and Exchange Commission, Case issued to its stockholders a proxy statement containing a notice of a special meeting of the stockholders to be held on November 15, 1956, for the purpose of approving or disapproving a plan whereby ATC would merge into Case.

On November 13, 1956, plaintiff filed his original action, naming Case and your petitioners herein, except Hamilton and Rojzman, defendants.¹ At the same time he obtained an order to show cause, returnable the following day, why Case, its officers, agents and employees should not be temporarily enjoined from taking any steps to advance the plan of merger described in the complaint. A hearing on the order to show cause was held on November 14, 1956, and the application for temporary injunction was denied on November 15, 1956. No appeal was taken from such denial.

¹ Barr, Brown, Clausen, Grede, Hamilton and Peters were directors of Case at that time. Hamilton, while not an original defendant, was added as a defendant upon the filing of the First Amended and Supplemental Complaint, April 1, 1958, as were Rojzman, Elliott, Kraus, Ewing, Sturgis and Choate. Of these latter, Rojzman was the president and a director of ATC and became an officer and director of Case after the merger was consummated on January 10, 1957. Elliott and Kraus were directors of ATC and became directors of Case after the merger. Ewing, Sturgis and Choate were directors of Case prior to the merger and continued as such after the merger. Elliott, Kraus, Ewing, Sturgis and Choate have all filed special appearances and challenged the claimed personal jurisdiction over them. These motions have never been decided by the District Court, and accordingly these defendants have not joined in this Petition.

On November 15, 1956, the plan of merger was approved by 91.8% of the common shares represented at the meeting, voting as a class,² being 70.37% of total issued and outstanding common shares, and considerably in excess of the two-thirds majority required under Wisconsin law to approve a merger. The merger was consummated on January 10, 1957.

Following extensive and protracted discovery proceedings initiated by plaintiff, an amended and supplemental complaint was filed on April 1, 1958, adding 29 additional defendants. On October 23, 1958, the trial court ordered plaintiff to post security for expenses or join 3% of the Case common stockholders as plaintiffs pursuant to Wisconsin statutes. The plaintiff did not comply with this order of the court and the action was dismissed as to all defendants (R. 554-560).

The plaintiff commenced, but did not perfect, an appeal of this dismissal. Instead, he sought and was granted leave to file a second amended and supplemental complaint. Later he again sought and was granted leave to file a third amended and supplemental complaint.

The plaintiff in Count I of this third amended and supplemental complaint, in the District Court's words, "... has grasped at the exception stated in the court's oral opinion of October 13, 1958 ... has alleged the same facts which the court previously held asserted a derivative cause of action (making the security for expense statute applicable), garnished those facts with conclusory allega-

² In addition, 98% of the 7% Cumulative Preferred Stockholders of Case represented at the meeting approved the merger, this being 79.0% of the total issued and outstanding shares of such stock, and also well in excess of the % majority required by class voting under Wisconsin law.

tions that pre-emptive rights have been violated . . ." The Court of Appeals without respecting the District Court's finding that it was a ruse and a guise, reversed and from its "impression of the complaint as a whole" elevated the "garnished" and "conclusory allegations" to constitute the gravamen of the cause of action and thus held such Count stated a primary cause of action to which the state security statute is not applicable. In reaching this extraordinary result the Court of Appeals was obliged to create a situation where a stockholder is both suing his corporation and at the same time suing on its behalf.

Count II of the third amended and supplemental complaint claimed a violation of Secs. 10(b) and 14(a) of the Securities and Exchange Act which pursuant to Sec. 29(b) of that Act voided the merger. The District Court held that the allegations as to violations of Sec. 10(b) were surplusage and inconsistent with the facts alleged, and the Court of Appeals concurred. The District Court, in addition, held that it would follow the precedent of *Dann v. Studebaker-Packard Corp.*, 288 F(2d) 201 (CA 6th, 1961) and exercise its jurisdiction only to declare the proxies solicited pursuant to federal law valid or invalid; that it had jurisdiction by reason of diversity to give all the relief plaintiff sought, but that such relief was determinable under State law and not by federal statute and accordingly the state security for expense statute was applicable to Count II.

The Court of Appeals, as to Count II held a cause could be and had been stated for violation of Sec. 14(a) of the Act. It reversed the District Court as to its adherence to the *Dann* decision in principle and specifically refused

to follow it. The Court of Appeals held that the entire cause of action in Count II was created by federal statute, that retrospective relief could be given under federal law and that the state security for expense statute could not be appended to the enforcement of such federal right.

Reasons for Granting the Writ

The decision of the Circuit Court of Appeals for the Seventh Circuit should be reviewed, as it reaches two important conclusions with respect to private actions brought under the Securities and Exchange Act, both in conflict with decisions in other circuits. Neither conclusion has been decided by this Court, but both should be.

1. THERE IS A DIRECT CONFLICT OF DECISIONS BETWEEN THE COURT OF APPEALS FOR THE SECOND CIRCUIT, ON THE ONE HAND, AND THE COURTS OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS ON THE OTHER.

Count II of the Third Amended and Supplemental Complaint attempts to state a cause of action on behalf of the corporation, J. I. Case Company, derivatively brought by one of its stockholders, seeking retrospective relief to declare stockholders' approval void, rescind a consummated merger and/or collect damages from its directors and others under Sec. 29(b) of the Act. Consistent with the holding in *Dann v. Studebaker-Packard Corp.*, 288 F(2d) 201 (CA 6th, 1961), the court below held that plaintiff could maintain an action of this purport in direct contrast to the opposite conclusion also reached in *Howard v. Furst*, 238 F(2d) 790 (CA 2nd, 1956), *Cert. den.* 353 U.S. 937, 77 S. Ct. 814 (1957):

It will be noted at the outset that a fundamental difference in basic approach accounts for these diametrically opposed decisions in the Circuits. In *Howard v. Furst*, *supra*, it was pointed out that the Securities Exchange Act is a comprehensive, carefully drafted piece of legislation; that express provisions for private suits were set forth in §§ 9(e), 16(b) and 18. A specific statute of limitations was also set forth for such actions and a general provision voiding contracts made in violation of the Act was added in § 29(b). (See, Loss, *Securities Regulation* (2d Ed.), p. 1746) Looking to the legislative history of the Act, the Court for the Second Circuit found no support for the maintenance of a private action. See, Ruder, *Civil Liability Under Rule 10(b)(5): Judicial Revision of Legislative Intent?*, 57 NW LR 627 (Jan.-Feb., 1963). The Court then proceeded to apply the maxim of *expressio unius exclusio alterius* and by analogy to *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921 (1953), held that ambiguous and equivocal language was insufficient to support an innovation in the law of such far-reaching results.

On the other hand, *Dann* and the court below in the instant case found that where a federal statutory duty is alleged to have been breached, a cause of action normally arises on behalf of the injured persons for whose benefit the statute was enacted. This conclusion is buttressed by citation of this Court's language in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773 (1946), and analogy to decisions which have sustained such an implied cause of action for alleged violation of Sec. 10(b) of the Act, such as *Fischman v. Raytheon Mfg. Co.*, 188 F(2d) 783 (CA 2d, 1951). See, Loss, *ibid*, *supra*, p. 1763.

The logical rules of statutory construction usually applied inescapably support the decision of *Howard v. Furst*, *supra*, because (a) all legislative history indicates no such private rights were intended in this particular instance; (b) the Act itself and the rules and regulations issued pursuant thereto provide in detail a procedure for submission and review of proxy statements by the Commission, and the Commission is clearly given the right to obtain judicial sanction to uphold its decisions in this regard (See, H.R. Rep. No. 1383, 73rd Cong., 2d Sess. (1934) pp. 13-14); (c) while the analogy to *Bell v Hood* and the Sec. 10(b)(5) decisions may be consistent because that section refers to rights for fraud and deceit "upon any person," Sec. 14(a) and its philosophy were included specifically for the purpose of furnishing information "essential to the intelligent exercise of his right of franchise"—(10 SEC Ann. Rep. 51 (1944))—that is, the mandate of the statute is aimed at a public purpose to be enforced by a created agency of government as opposed to the mandate of Sec. 10(b) which deals with direct frauds upon individuals.

Moreover, the cause of action for violation of § 14a of the Act, created by the Court of Appeals for the Seventh Circuit's construction of § 27 of the Act, imposes an unnecessary and unintended hardship upon corporations and their shareholders. Not only is there no reason to believe that Congress intended to allow a shareholder to challenge major corporate transactions after the fact in a new type of federal proceeding, but it is unnecessary for the courts to create such a new type federal proceeding. As Judge Dimock pointed out in *Lapchak v. Barium Steel Corp.*, CCH Fed. Sec. L. Rep., Par. 90,721 (S.D.N.Y., 1955), the gravamen of a shareholder's claim for retrospective relief, even when an allegedly misleading proxy statement is involved, must in essence rest upon state law:

"Even plaintiffs concede that if the proxy statement were followed by a fair exchange the directors would not be liable to the corporation. Also, it is clear that, had the proxy statement been perfectly lawful but followed by an unfair exchange, the directors would be liable for damage sustained and profits realized in violation of their fiduciary duties."

"... Since the liability asserted by plaintiffs may be proved without regard to the proxy statements and cannot be proved without regard to the alleged breach of fiduciary duty it is impossible to say that plaintiffs are asserting a right under or created by a federal law. The allegations as to the proxy statement are either mere surplusage or a mere pretext for assertion of federal jurisdiction."

2. THERE IS A DIRECT CONFLICT OF DECISIONS BETWEEN THE COURT OF APPEALS FOR SIXTH AND SEVENTH CIRCUITS.

If it is determined that, absent a supporting legislative history and clear and unambiguous statutory authority, Congress did intend or the federal courts will recognize a private action for alleged violations of Sec. 14(a) of the Act, it then becomes important to determine the limitations, if any, upon the relief available under the Act. Again there is a direct conflict in the circuits. In *Dann, supra*, the Sixth Circuit held that relief would be limited to a declaratory judgment as to the validity or invalidity of the proxies solicited pursuant to Sec. 14(a) and that retrospective relief in the form of rescission and damages was dependent upon the application of state law, which it would not apply in that case because of a lack of diversity of citizenship.

In the instant case, the District Court followed *Dann* in principle, but, since diversity of citizenship was present, held the court had jurisdiction to grant any relief to which the plaintiff could show he was entitled. It was specifically held; however, that the relief of rescission and damages was so interrelated with the organic law of the corporation that the main thrust of the action was derivative under state law and the Wisconsin security for expenses statute was applicable.

The Seventh Circuit Court of Appeals, in reversing the trial court, specifically disagreed with the Sixth Circuit's rationale in *Dann*. It stated that the Sixth Circuit had failed to correctly distinguish *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96 (1930) in its application. The Seventh Circuit held that *Gully* involved a federal statute only collaterally, whereas in *Dann* and the instant case the "whole right of action" is derived from the federal statute.

Petitioners submit that this is an erroneous distinction, for plaintiff's claim under Count II in the instant case cannot be adjudicated without reference to and reliance upon the Wisconsin statutory law and the organic law of the corporation. In this regard, the language of *Howard v. Furst, supra*, at p. 79, is particularly in point:

"Applying this test it is clear to us that every essential element of appellant's case depends upon the common law and the statutes of the State of New York. If the individual defendants who controlled 60.68% of Circle's outstanding stock, in violation of their fiduciary duties as directors and officers of Circle, brought about a sale of Circle's assets for a grossly inadequate sum, all in furtherance of their personal and private interests, the case would be ripe

for judgment for rescission of the sale or for damages, wholly irrespective of whether some or all of the individual defendants had participated in the formulation and sending out of a false or misleading proxy statement. The allegations with reference to the proxy statement constitute a mere excrescence or superfluity tacked onto what are otherwise sufficient allegations of a claim for relief under New York law.

"The controversy as to the interpretation to be given Section 14(a) is, therefore, not basic but collateral to appellant's case."

The Seventh Circuit's second claim of distinction is that *Dann* failed to distinguish between a question of jurisdiction and the merits of the case. The substance of this assertion does not appear clear from the balance of the opinion, for the court below then proceeded to state that Sec. 27 has often been held to provide private remedies for violations of Sec. 10(b), a conclusion to which no one takes exception.

3. THE QUESTIONS PRESENTED ARE IMPORTANT AND CONFLICTS SHOULD BE RESOLVED BY THIS COURT.

The questions presented by this case are of great and recurring significance, both to individual stockholders, the investing public, corporate officers and directors, and the Securities and Exchange Commission, which asked and was granted leave to appear *amicus curiae* in the Court of Appeals. The important nature of these issues as to individual rights under the Securities Exchange Act and the breadth of the judicial function and power make this case peculiarly appropriate for the exercise of this Court's discretionary jurisdiction. There is plain conflict among three circuits.

CONCLUSION:

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX

**Opinion of the Circuit Court of Appeals for the
Seventh Circuit, dated May 29, 1963**

In the

**United States Court of Appeals
For the Seventh Circuit**

No. 13947 SEPTEMBER TERM, 1962 APRIL SESSION, 1963

**Carl H. Borak, for and on behalf of
himself and all of the other common
stockholders of J. I. Case Company
who are similarly situated to him,
*Plaintiff-Appellant,***

v.

**J. I. Case Company, a Wisconsin cor-
poration, Marc B. Rojzman, indi-
vidually and as representative of
all American Tractor Corporation
shareholders who received J. I.
Case Company common and second
preferred stock in the merger here-
in referred to, and their successors
in interest, John B. Elliott, Ex-
ecutor of the Estate of Edward L.
Elliott, deceased, A. O. Choate, Wil-
liam Ewing, L. R. Clausen, H. S.
Sturgis, John T. Brown, H. G. Barr,
William J. Grede, E. P. Hamilton,
William B. Peters, Mentor Kraus,
and Nathaniel C. Beeber, indi-
vidually and as representative of all
holders of common stock purchase
warrants issued by American Trac-
tor Corporation to the purchasers
of its preferred stock, Series 56-1,
*Defendants-Appellees.***

**On Appeal from
the United
States District
Court for the
Eastern District
of Wisconsin.**

May 29, 1963

Before DUFFY and KILEY, *Circuit Judges*, and MERCER, *District Judge*.

MERCER, *District Judge*, Plaintiff, Carl H. Borak, the holder of 2,000 common shares of J. I. Case Company, hereinafter referred to as Case, commenced this suit below on November 13, 1966, by filing his complaint in which he sought to have the then proposed plan of merger between Case and American Tractor Corporation, hereinafter ATC, declared illegal and void and to have Case and its officers and directors enjoined from taking any action to consummate the plan. Injunctive relief was denied. Subsequently plaintiff has filed three amended and supplemental complaints, the third of which was filed on January 12, 1962. It is that complaint which gives rise to this appeal. That complaint is in two counts, the first of which is based upon the laws of the state of Wisconsin and invokes the court's jurisdiction on the basis of diversity of citizenship. The second count purported to allege violations of Section 10(b) and 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. A. 78j(b), 78n(a), and the jurisdiction of the court over that count is asserted to exist by reason of the provisions of Section 1331 and Section 1337 of the Judicial Code, 28 U. S. C. A. 1331, 1337, and Section 27 of the Securities Exchange Act. 15 U. S. C. A. 78aa.¹

¹ "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum, or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." 28 U. S. C. A. 1331(a).

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U. S. C. A. 1337.

"The district courts of the United States * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. * * *" 15 U. S. C. A. 78aa.

After the third amended complaint was filed, the defendant² filed a motion for an order to compel plaintiff to provide security for expenses incurred and to be incurred by the defendants in defending the suit to comply with the provisions of Wis. Stat. § 180.405(4).³ After a hearing upon that motion the court filed an opinion holding that the only cause of action stated in count 1 of the complaint was derivative in nature and that the Wisconsin security for expense statute applied thereto, that count 2 does not state a cause of action under Section 10b of the Act,⁴ that

² The identity of persons who have from time to time been named defendants in this suit has varied in the several amended complaints. Since the precise identity of the persons who are defendants has no particular bearing upon the issues presented on this appeal, the term "defendants", when used in this opinion, is a reference to all persons who were so named at any particular stage of the proceedings below as the context may require.

³ "In any action brought in the right of any foreign or domestic corporation by the holder or holders of less than 3 per cent of any class of shares issued and outstanding, the defendants shall be entitled on application to the court to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees. * * *" Wis. Stat. 1961 § 180.405(4).

This statute is sometimes in the opinion referred to as "the Wisconsin statute", without more precise description thereof.

⁴ "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

"(a) * * * *

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. A. 78j(b).

the only relief which it had jurisdiction to grant under Section 14(a)⁵ of the Act was a declaratory judgment as to the validity or invalidity of the proxies involved in the suit, and that, insofar as count 2 prayed relief other than such a declaratory judgment, that count also stated a derivative cause of action under Wisconsin law, which was subject to the provisions of the Wisconsin security for expense statute. Accordingly, the court ordered plaintiff to furnish a bond in the amount of \$75,000.00, conditioned for the payment of expenses to be incurred by the defendants in defending the suit. Upon plaintiff's refusal to provide security in accordance with that order, the court ordered that count 1 of the complaint be dismissed and that count 2 thereof likewise be dismissed, except to the extent that that count might be construed as a suit under Section 14(a) for a declaratory judgment as to the validity of the proxies solicited for the Case-ATC merger. This interlocutory appeal was then taken pursuant to the provisions of 28 U. S. C. A. 1292(b) and the order of this court, entered October 24, 1962, granting to plaintiff leave to appeal.

Three issues are presented on this appeal. First, did the court below err in its conclusion that the cause of action stated in count 1 of the complaint was derivative in nature and therefore subject to the provisions of Wisconsin security for expense statute? Second, did the court below err

⁵"(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security * * * registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. A. 78n(a).

in its holding that the Wisconsin statute applies to count 2 of the complaint insofar as that count sought retrospective relief? Third, did the court below err in holding that count 2 of the complaint did not state a cause of action under Section 10(b) of the Securities Act?

With respect to count 1 of the complaint, the only issue before us for decision is the question whether the court correctly held the provisions of the Wisconsin statute applicable to plaintiff's cause of action. As the court recognized in its opinion, that issue depends upon a determination whether the allegations of the complaint state a derivative cause of action brought on behalf of the corporation, or a primary cause of action to redress an injury to plaintiff as a Case stockholder. If the cause of action stated is derivative, then the statute was properly applied. If it is not derivative, but is a primary right in the plaintiff, the statute has no application.

Plaintiff's first amended and supplemental complaint asserted a derivative cause of action on behalf of the corporation. After the court ruled that the Wisconsin statute applied to the case and ordered plaintiff to furnish bond in the amount of \$75,000.00, plaintiff amended his complaint in an attempt to allege the denial of his preemptive right to participate in the issuance of Case shares and an injury to himself, individually, as a shareholder of Case. He supported that allegation by the reallegation of essentially the same material facts which were alleged in the first amended complaint.⁶

⁶ Plaintiff filed this suit as a class action on behalf of himself and all other Case shareholders who are similarly situated. For convenience in this opinion, however, the singular "plaintiff" is used, with no reference being made to the class which he purports to represent, except where the context otherwise requires.

In holding the Wisconsin statute applicable to count 1 of the third amended complaint, the court below said, in part:

"After reviewing the allegations of count 1, it is clear to us that the plaintiff still complains of fraud and self-dealing, failure of directors to perform their fiduciary duties, etc., as in the first amended and supplemental complaint, and seeks redress for the alleged wrong in behalf of the corporation. He does not allege any wrong to himself different from that suffered by other stockholders, nor limit the relief sought to damages sustained by reason of loss of pre-emptive rights. He is concerned in our opinion not with the fact that stock was issued to others without being first offered to Case stockholders but with the fact that stock was issued for an allegedly insufficient consideration. We therefore hold that § 180.405(4) was applicable, that count 1 set forth a derivative cause of action and that the plaintiff must furnish security for reasonable expenses."

The principle that directors of a corporation owe a fiduciary duty to the corporation and the stockholders thereof, to deal honestly in corporate affairs is hornbook law requiring no citation of authority. As it affects the rights of shareholders, that duty has a two-fold aspect. Except where the right has been abolished by statute, or, where permissible, by provision in a corporate charter, the shareholders of a corporation have a preemptive right to participate ratably in the issuance of new shares of the corporation if they desire so to do. E.g., *Luther v. C. J. Luther Company*, 118 Wis. 112, 9 N. W. 69; *Spaulding v. North M. & T. S. Co.*, 106 Wis. 481, 494, 81 N. W. 1064; *Hammer v. Werner*, 239 App. Div. 38, 265 N. Y. S. 172. In addition to the preemptive right, the directors and officers of a corporation owe a fiduciary duty to not use their positions for their own personal advantage, or for the

advantages of others, to the detriment of the interests of the stockholders of the corporation. E.g., *Luther v. C. J. Luther Co.*, *supra*, 94 N. W. at 72; *Hammer v. Werner*, *supra*; *Schwab v. Schwab-Wilson Mach. Corp., Ltd.*, 13 Cal. App. 2d 1, 55 P. 2d 1268. A breach of the duty owed to the shareholders of a corporation in that respect gives rise to a cause of action by the shareholders in their own right. *Ibid.* Count 1 of this complaint must be measured in the light of those established legal principles.

We are indebted to Judge Tehan for the following summary of the allegations of count 1 of the complaint which, with slight embellishment, is taken verbatim from his memorandum.

Count 1 of the complaint alleges that plaintiff, the owner of 2,000 shares of Case common stock acquired prior to the merger complained of, sues in a representative capacity on behalf of himself and all other common stockholders prior to the merger except those participating in or cognizant of the wrongdoing alleged. In addition to Case, he joins as defendants certain of its directors and former directors, some of whom are also officers and former officers, and the executor of the estate of a deceased director. Defendants who are now directors of Case are sued individually and as directors, the defendant Rojzman is sued individually and as representative of American Tractor Corporation shareholders receiving Case stock as the result of the merger between Case and American Tractor Corporation, and the defendant Beeber is also sued, individually and as representative of holders of certain purchase warrants. In Count 1, the plaintiff alleges substantially as follows: In October 1956, Case formally announced to its shareholders a proposed plan of merger between Case and American Tractor Corporation and

proposed stock option amendments, which were purportedly approved by Case shareholders on November 15, 1956. The merger was purportedly consummated on January 10, 1957. Both the merger and stock option plan were effectuated by illegal and fraudulent acts and illegally deprived the plaintiff and other shareholders similarly situated of their preemptive right—rights which the plaintiff here seeks to enforce. Under the merger and plan, 648,852 shares of common stock and 1,197,704 shares of second preferred stock were set aside or issued without granting the plaintiff's class their pre-emptive rights to subscribe thereto.

The plaintiff then describes in some detail the acts which he believes to have resulted in a violation of the pre-emptive rights of Case shareholders as follows: In 1954, Elliott's company and a syndicate headed by him acquired 170,000 shares of American Tractor Corporation stock. Elliott violated the Securities Act of 1933 and regulations thereunder in connection with that stock and the sale of a portion thereof. Thereafter, the market price of American Tractor Corporation stock, most of which was held by Elliott, Rojzman and their associates, began an unreasonable rise, due to illegal manipulations, which manipulations Elliott was aware of prior to the merger. Rojzman, Brown, Grede and the Case management also knew prior to the merger that the market price of ATC stock was achieved illegally and artifiically. Since the merger one person has been found guilty in another district court of manipulating ATC stock from May, 1955 to February, 1956; and Alligan, Will and Company, formerly defendant in this cause and the specialist in ATC stock on the American Stock Exchange was found by the Securities and Exchange Commission to have engaged in improper and illegal activities while specialist with respect to ATC stock.

Case directors violated Wisconsin law and breached their fiduciary duties to the shareholders in approving the merger by including future earnings of American Tractor Corporation and future services of its officials as partial consideration for issuance of Case stock, by agreeing to issue Case stock at less than par value, by failing to evaluate properly the American Tractor Corporation assets acquired and paying an excessive price for American Tractor Corporation, by over-valuing American Tractor Corporation's and undervaluing Case's earnings and book value resulting in a fraud on Case shareholders, by relying on market price of American Tractor Corporation stock as a measure of American Tractor Corporation's value, by relying on American Tractor Corporation's own appraisal of its physical assets and failing to examine that appraisal, by considering future earnings as an element of value and by failing to recognize the necessity of future investments as part of the cost of the merger.

Case directors breached their fiduciary duties by approving and issuing a letter and proxy statement of October 15, 1966, prior to the meeting at which the merger was approved which contained numerous material omissions and false and misleading statements relied upon by Case shareholders in approving the merger and without which the merger would not have been approved. Three pages of the complaint are given over to instances thereof.

For example, it is alleged that defendants failed to disclose that the total purchase price of ATC exceeded \$17,000,000, that the book value of Case common stock was \$36.00 and ATC's only \$1.15, that persons who negotiated the merger were recipients of stock options; and that one of the director defendants, as a supplier, would receive a substantial increase in business as a result of the merger,

the merger was fair because in accordance with the comparative market prices of the two stocks, and the Case common shareholders would not be adversely affected when in fact their proportionate interest in the earnings, book value and voting power were seriously diluted.

Both the Case and American Tractor Corporation management groups were guilty of self dealing in connection with the plan and merger.

The conduct of the defendants, the plaintiff claims, constitutes actual or constructive fraud on himself and other shareholders similarly situated depriving them of their pre-emptive rights. He claims that if they had been permitted to purchase stock issued in the merger on the same basis as American Tractor Corporation shareholders, they could have obtained one-fourth share of common stock and one-half share of second preferred stock for \$2.20 for each share of Case common stock held by them at the time of the merger.

In Paragraph 19 of Count 1 of his complaint, the plaintiff alleges facts occurring after the merger particularly, that Brown, Grede, Rojzman and other principal defendants were no longer with Case and that Case was nearly bankrupt, in Paragraph 20 he alleges that the class he represents has been irreparably damaged by failure to recognize pre-emptive rights, and in his prayer for relief he asks that the court enter judgment in favor of the class he represents and against Case directors who approved the merger and all defendants the court finds responsible for the merger and the consequent deprivation of pre-emptive rights in an amount to be determined and/or that the court enter a decree directing Case to issue to the class he represents such securities of Case as the court deems necessary to compensate the class for violation of pre-emptive rights, and asks for such other relief as equity shall require.

Judge Tehan was correct in his conclusion that the facts alleged in count 1 are basically consistent with the statement of a derivative cause of action to redress a wrong to the corporation, but that conclusion does not resolve the issue which is before us. Those same facts may also state a primary cause of action by a stockholder for relief from injury to himself resulting from unlawful and fraudulent practice. *Hammer v. Werner*, 239 App. Div. 38, 256 N. Y. S. 172; *Schwab v. Schwab-Wilson Mach. Corp., Ltd.*, 13 Cal. App. 2d. 1, 55 P. 2d 1268; *Hagan v. Superior Court of Los Angeles County*, 2 Cal. Retr. 288, 348 P. 2d 896, 898.

In *Hagan*, for example, shareholders of a corporation intervened in a suit for dissolution of the corporation, alleging that the directors who had filed the suit for dissolution refused to recognize them as shareholders of the corporation, and that some of the directors had been parties to a scheme to fraudulently divert funds from the corporation to the detriment of the rights of the shareholders. The trial court ordered the plaintiffs to provide security for costs of the suit pursuant to the provisions of the California Corporation Code. The shareholders then filed a prohibition suit in the California Supreme Court alleging that the trial court had threatened them with contempt if they sought to take any further action in the dissolution suit without first complying with the order to provide security for costs. In granting the writ of prohibition, the court held, 348 P. 2d at 898, that the security statute did not apply to the intervening shareholders who were seeking to vindicate their own rights, even though their complaint in intervention alleged facts which would also give rise to a cause of action by the corporation.

We think the trial court failed to recognize the principle that the same allegations of fact might support either a derivative suit or an individual cause of action by share-

holders. We think count 1 of the complaint adequately states a cause of action for the redress of rights individual to the Case stockholders.⁷

Defendant's contentions that plaintiff is affected by the circumstances alleged in the same way as all stockholders of Case are affected, and that his suit is therefore, derivative, fails to take into account the realities of the circumstances alleged and the clear indication to the contrary of the Wisconsin decisions. If the allegations of the complaint are true, as we must assume them to be for present purposes, two separate categories of Case shareholders must be recognized, namely, those shareholders who participated in the practices alleged and benefited by the merger and related agreements and those shareholders who were not participants, with the result, as it is alleged, that their proportionate interest in the corporation was diluted. The former are expressly excluded from the class which plaintiff purports to represent. In this respect, this complaint cannot be distinguished from the complaint in *Luther v. C. J. Luther Co.*, *supra*, in which a part of the shareholders were aligned as plaintiffs against others as defendants.⁸

One further contention of the defendants must be noted. They argue, citing *Dousman v. The Wisconsin & L. S. M. & S. Co.*, 40 Wis. 418, 422, that an individual cause of action

⁷ Our conclusion is based upon the impression of the complaint as a whole, and it should not be construed as precluding the possibility that count 1 might contain specific allegations which are consistent with a derivative cause, only, and which are subject to being stricken as surplusage.

⁸ Closely related to that contention is the defendants' argument that a class suit will not lie for the redress of shareholders' rights. However, that argument does not affect the merit of the complaint as stating a primary cause of action, and we express no opinion as to the validity of the argument. If the argument is valid, it may be presented to the court below upon a proper motion directed against the complaint.

to redress a violation of the rights of shareholders must be brought against the corporation alone. That position is not valid. In most of the cases in which courts have taken jurisdiction to vindicate the rights of shareholders, the suit has been against the corporation involved and its directors or other persons alleged to have been responsible for the injury. E.g., *Luther v. C. J. Luther Co., supra*; *Hammer v. Werner, supra*; *Schwab v. Schwab-Wilson Mach. Corp., Ltd., supra*. A director of a corporation acts as a fiduciary not only to the corporation but also to the stockholders, and the essence of a cause of action by a stockholder, based upon allegations of fraudulent acts by a director, is not the fraud against the corporation, but the fraud of the director as it affects the stockholders. *Schwab v. Schwab-Wilson Mach Corp., Ltd., supra*, 55 P. 2d at 1269. While *Dousman* does contain statements which tend to support defendants' argument, such statements must be read in the light of the fact that only the corporation was named as a defendant in that suit. Moreover, to the extent that *Dousman* is authority for the proposition that a suit by an individual stockholder lies only against the corporation, its weight as authority is certainly undermined, if not overruled, by the later decisions in *Luther* and other Wisconsin cases.

We hold that count 1 of the complaint does state a cause of action on behalf of the stockholders individually, and that the court erred in holding that the provisions of the Wisconsin statute are applicable thereto.

In considering the correctness of the court's decision as it relates to count 2 of the complaint,⁹ an analysis of the court's opinion in the light of the procedural history of the case places the issues in perspective. The plaintiff's

⁹ We are aided in our consideration of this issue by an exhaustive brief filed by the Securities and Exchange Commission as *amicus curiae*.

original complaint and his first amended complaint were based upon allegations of violations of state law, federal jurisdiction being predicated upon diversity of citizenship. After the court had held that the Wisconsin statute applied to the cause of action, plaintiff obtained leave to file his second amended complaint alleging both a violation of state law and a violation of the Securities Exchange Act. That complaint set forth both of those alternative causes of action in a single count, alleging, insofar as the Securities Exchange Act was concerned, a violation of Section 14(a). On January 2, 1962, upon a hearing on defendants' motion to compel a bond for expenses under the Wisconsin statute, the court ordered that plaintiff file a third amended complaint stating, in separate counts, the alternative causes of action under state law and under Section 14(a). At the same time, the court asked the plaintiff to consider the application to his cause of action of the decision in *Dann v. Studebaker-Packard Corp.*, 6 Cir., 288 F. 2d 201.

Thereafter the third amended and supplemental complaint was filed. As the jurisdictional basis for count 2, plaintiff asserted diversity of citizenship between the parties, Section 27 of the Securities Exchange Act and Sections 1331 and 1337 of the Judicial Code. 28 U. S. C. A. 1331, 1337.

By reference, plaintiff realleged substantially all of the charging paragraphs contained in count 1 of the complaint. He alleged that the merger between Case and ATC was consummated early in 1957, following its approval by a vote of two-thirds of the outstanding common and preferred shares of Case at a special stockholders meeting held for that purpose. The count alleged that the proxy solicitation material issued by the defendants prior to that special meeting was false and misleading and its use constituted a violation of Section 14(a) of the Act and the SEC

Rules promulgated thereunder: 17 CFR 240.14a-3, 140.14a-9. The theory of the cause of action stated in that count was the contention that the Case-ATC merger and stock option agreements approved by the vote of proxies given by shareholders of Case in response to allegedly unlawful proxy solicitation material were void agreements under the provisions of Section 29(b) of the Act. 15 U. S. C. A. 78cc(b). Plaintiffs sought relief declaring that the proxy solicitation material was false and misleading, that the proxies solicited thereby were illegal and void, and that the merger and all agreements entered into pursuant thereto were void. He also prayed damages for injuries sustained by himself and all other stockholders similarly situated which grew out of violation of the Act, and such other and further relief as equity might require.

In ruling upon the defendants' motion for security and in holding that the Wisconsin statute applied in part to count 2 thereof, the court relied upon the decision in the *Dann* case. Thus the court held that federal jurisdiction in a civil action for violation of the provisions of Section 14(a) is limited to the granting of prospective relief, i.e., a declaration of the validity of the proxy solicitation material as the merits of the cause might require. The court further held that count 2, insofar as it alleged a cause of action for damages and relief other than a declaratory judgment of the invalidity of the proxy solicitation material, was a suit arising under state law to which the Wisconsin statute applied. Finally, the court held that the allegations of count 2 did not state a cause of action for violation of Section 10(b) of the Act.

We think the court correctly held that Section 10(b) of the Act has no application to the facts alleged in the complaint at bar. That section and Rule 10(b)-5, promulgated thereunder, 17 CFR 240.10b-5, prohibits the use of manipu-

lative and deceptive devices in connection with the purchase or sale of securities, and afford a basis for a civil remedy for damages and other relief to persons injured by the use of such practices. E.g., *Ellis v. Carter*, 9 Cir., 291 F. 2d 270; *Smith v. Bear*, 2 Cir., 237 F. 2d 79; *Hooper v. Mountain States Securities Corp.*, 5 Cir., 282 F. 2d 195; cert. denied, 365 U.S. 814. We need not consider whether misleading proxy material may, under any circumstances, constitute a manipulative and deceptive device within the prohibition of that Section, and we express no opinion upon that subject. We hold only that the facts alleged in this complaint directly invoke the provisions of Section 14(a), and that only sheer speculation can bring the provisions of 10(b) into play.¹⁰

¹⁰ The second amended complaint alleged a violation of Section 14(a) only. After plaintiff was directed to file a third amended complaint stating his alternative causes of action in separate counts, and after plaintiff had been requested to consider the impact of the *Dann* decision upon his complaint, he filed his third amended complaint in which he alleged the violation of 10(b) as well as 14(a). We think it not unreasonable to infer, as Judge Tehan did, that 10(b) was alleged in an attempt to circumvent *Dann*.

It also appears that count 2 was muddled by the allegations of diversity of citizenship for the same purpose. In the reasoning of the *Dann* opinion leading to the conclusion that there was no jurisdiction to award the relief prayed upon the merits of the complaint, the court observed that there was no allegation of diversity of citizenship to support jurisdiction over what the court construed to be a cause arising under state law. Plaintiff argues, or implies, that the court predicated its decision that there was no federal jurisdiction upon the lack of diversity allegations. He seeks to distinguish *Dann* from this complaint upon that basis. His analysis of *Dann* is false in that regard. The court had held that there was no jurisdiction under Section 27 of the Securities Exchange Act, and no cause of action arising under a statute of the United States. Its discussion of diversity was directed to a determination whether the allegations of the complaint would sustain federal jurisdiction to decide questions of state law. If there be jurisdiction under Section 27, that jurisdiction is neither enlarged nor diminished by the existence, or non-existence, of diversity of citizenship.

The diversity allegations of count 2 are wholly surplusage.

The critical issue with respect to the decision below as it relates to count 2 is the question whether the trial court correctly held that federal jurisdiction in a civil cause of action for enforcement of the provisions of Section 14(a) is limited to declaratory relief. Since the court below relied in its decision on the *Dann* case, we approach that issue from an analysis of *Dann*.

The complaint in *Dann*, filed by a stockholder of Studebaker, alleged the waste and dissipation of Studebaker assets growing out of a fraud upon the shareholders of Studebaker, which allegedly resulted from the use of false and misleading proxy solicitation materials. The complaint predicated jurisdiction upon the provisions of Section 27 of the Act and Section 1331 of the Judicial Code. The complaint prayed that the court declare void proxies solicited in violation of the provisions of Section 14(a), and, in the event that the court found that such void proxies had controlled the vote of Studebaker stockholders approving the arrangement between Studebaker and Curtiss-Wright Corporation of which complaint was made, that the court would, by its decree, restore Studebaker to its economic condition which had obtained prior to consummation of the arrangement with Curtiss.

The trial court dismissed the complaint. The Court of Appeals reversed, holding that a cause of action was stated under Section 14(a). Thus the court held that a civil suit by a shareholder will lie to enforce the provisions of that section. The court, however, having determined that a federal cause of action was stated by the complaint, then addressed itself to the question whether it had jurisdiction to grant the relief sought in the complaint. 288 F. 2d at 210-215. In reliance upon language contained in the opinion in *Gully v. First National Bank*, 299 U.S. 109, 117-118, the court concluded that federal jurisdiction under Section 14(a) is limited to declaratory relief related to the

validity or invalidity of proxies obtained in violation of the Act. Thus the court said, 288 F. 2d at 214:

" * * * In reaching this decision, we are deciding that federal jurisdiction must end with the holding of a contested proxy election, that the right created by Section 14(a) of the Exchange Act is only broad enough to permit consideration of the *validity* of the proxies solicited in violation thereof, but it is not broad enough to permit the federal courts to determine the consequent *effects* of the validity or invalidity of said proxies."

Finally, the court held that the right to damages and other retrospective relief arising out of a violation of 14(a) is a question of state law, because such a remedy requires the interpretation and application of state, as well as federal law.

We respectfully disagree with the decision in *Dann* for two reasons. First, the court failed to note a critical distinction between the jurisdictional facts of *Gully* and *Dann*, namely, that a federal statute was involved only collaterally in the former, whereas the whole right of action in the latter was derived from a federal statute.

Gully was a suit by a state to collect local taxes levied against a national bank. The only ground upon which federal jurisdiction could be claimed was the fact that the bank had been chartered under an Act of Congress. Upon that factual background, the court held that the case arose under state law, uninfluenced by the fact that a federal statute had a collateral bearing thereon.¹¹

By contrast, in *Dann* the complaint alleged a direct violation of a federal statute. Thus the controversy is a basic one requiring the interpretation and application of a federal statute. The rationale of *Gully* has no bearing upon the jurisdictional question.

¹¹ See also, *Chicago & N. W. Ry. Co. v. Toledo, P. & W. R. Co.*, S.D. Ill., F. Supp.

Second, in our opinion, the court in its reasoning failed to distinguish between the question of jurisdiction and the question upon the merits of the case whether the plaintiffs were entitled to the relief which they sought. See, concurring opinion, Miller, C. J. 288 F. 2d at 217, 218.

Section 14(a) prohibits the solicitation of proxies of securities listed on a national exchange in violation of SEC Rules promulgated thereunder. Rule 14a-9 prohibits the use of false and misleading statements with respect to any material fact or the omission of material facts which would render any statement contained in a proxy solicitation false or misleading. 17 CFR 240.14a-9.

Section 27 of the Act vests exclusive jurisdiction in the United States District Courts over violations of the Act or SEC Rules and over all suits in equity or actions at law brought to enforce any liability or duty created by the Act or SEC Rules.

The obvious purpose of Section 14(a) is the protection of the right of shareholders to a full and fair disclosure of all material facts which affect corporate elections by proxy. *Dann v. Studebaker-Packard Corp.*, *supra*, at 208. See also *SEC v. Transamerica Corp.*, 3 Cir., 163 F. 2d 511, 518, cert. denied 332 U.S. 847. For the achievement of that purpose, the jurisdiction conferred by Section 27 must be broad enough to effectively protect that right. Thus, it is said in *Bell v. Hood*, 327 U.S. 678, 684, that federal courts have the power, under a general grant of jurisdiction to enforce a federal statute, to grant all of the relief which may be commensurate with the effective enforcement of the statute and the protection of rights created thereby, notwithstanding the failure of the statute to specify the remedies which may be employed.

Indeed, Section 27 has many times been so construed in cases arising under Section 10(b), the courts holding

that the jurisdictional grant includes the power to award damages and other retrospective relief. E.g., *Ellis v. Carter*, 9 Cir., 291 F. 2d 276; *Hooper v. Mountain States Securities Corp.*, 5 Cir., 282 F. 2d 195, cert. denied 365 U.S. 814; *Smith v. Bear*, 2 Cir., 237 F. 2d 79; *Fischman v. Raytheon Mfg. Co.*, 2 Cir., 188 F. 2d 783; *Kohler v. Kohler Co.*, E.D. Wis., 208 F. Supp. 808, 820. In at least two cases decided prior to *Dann*, the courts assumed the existence of power under Section 27 to award retrospective relief by whatever remedy might be necessary in a particular case to protect the rights created under Section 14(a). *SEC v. Transamerica Corp.*, 3 Cir., 163 F. 2d 511, 518, cert. denied, 332 U.S. 847; *Mack v. Mishkin*, S.D.N.Y., 172 F. Supp. 885, 889. *Contra*, *Howard v. Furst*, S.D.N.Y., 142 F. Supp. 507, aff'd on other grounds, 2 Cir., 238 F. 2d 790, cert. denied 353 U.S. 937.

In *Deckert v. Independence Shares Corp.*, 311 U.S. 282, the Court, applying the provisions of the Securities Act of 1933, which were similar to the provisions of Section 27, held that purchasers of securities sold in violation of the Act had a civil cause of action, not only against the vendor of the securities and other persons specified in Section 12(a) of the Act, but also against a third person having assets of the vendor in its possession. The court said, in part, 311 U.S. at 288:

"The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case * * *."

In other cases the courts have held a general grant of jurisdiction to the district courts to enforce a federal statute effective to authorize the appointment of a receiver in a suit for violation of the Investment Company Act of

1940,¹² *Aldred Investment Trust v. SEC*, 1 Cir., 151 F. 2d 254, 261, cert. denied 326 U.S. 795, a decree of restitution of rents collected in excess of the maximum rents permissible under the Emergency Price Control Act of 1942,¹³ *Porter v. Warner Holding Company*, 328 U.S. 395, a decree of restitution for loss of wages resulting from a violation of the Fair Labor Standards Act of 1938,¹⁴ *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291, and a decree of divestiture of property held in violation of Sections 1 and 2 of the Sherman Act.¹⁵ *Schine Chain-Theatres, Inc. v. United States*, 334 U.S. 110.

We think the same principle must be applied in determining the scope of federal jurisdiction for the protection of rights created by Section 14(a). We hold that the court below has jurisdiction under Section 27 to award damages or such other retrospective relief to the plaintiff as the merits of the controversy may require.

The court below erred in holding the Wisconsin statute applicable to count 2. *McClure v. Borne Chemical Co.*, 3 Cir., 292 F. 2d 824, cert. denied 368 U.S. 939; *Fielding v. Allen*, 2 Cir., 181 F. 2d 163, cert. denied, *sub nom Ogden Corp. v. Fielding*, 340 U.S. 817.

The order dismissing plaintiff's third amended complaint is reversed, and the cause is remanded to the court below for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit.

¹² 15 U. S. C. A. 80a-35.

¹³ 50 App. U. S. C. A. 925(a).

¹⁴ 29 U. S. C. A. 215(a), 217.

¹⁵ 15 U. S. C. A. 1, 2.

SECURITIES EXCHANGE ACT OF 1934**Sec. 14(a)**

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect to any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Sec. 27

The district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district, or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so

rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Sec. 29(b)

Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation: *Provided*, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security, in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within 3 years after such violation.

Rule X-10B-5

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

- (1) to employ any device, scheme, or artifice to defraud,
- (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection, with the purchase or sale of any security.

**INFORMATION TO BE FURNISHED SECURITY
HOLDERS**

Rule X-14A-3

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a written proxy statement containing the information specified in Schedule 14A.

(b) If the solicitation is made on behalf of the management of the issuer and relates to an annual meeting of security holders at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) shall be accompanied or preceded by an annual report to such security holders containing such financial statements for the last fiscal year as will, in the opinion of the management, adequately reflect the financial position and operations of the issuer. Such annual report, including financial statements, may be in any form deemed suitable

by the management. This paragraph shall not apply, however, to solicitations made on behalf of the management before the financial statements are available if solicitation is being made at the time in opposition to the management and if the management's proxy statement includes an undertaking in bold-face type to furnish such annual report to all persons being solicited, at least twenty days before the date of the meeting.

(c). Four copies of each annual report sent to security holders pursuant to this rule shall be mailed to the Commission, solely for its information, not later than the date on which such report is first sent or given to security holders or the date on which preliminary copies of solicitation material are filed with the Commission pursuant to Rule X-14A-6(a), whichever date is later. The annual report is not deemed to be "soliciting material" or to be "filed" with the Commission or otherwise subject to this regulation or to the liabilities of Section 18 of the Act, except to the extent, that the issuer specifically requests that it be treated as a part of the proxy soliciting material or incorporates it in the proxy statement by reference. *(As amended by Release No. 4979, effective as to any solicitation of proxies commenced on or after February 6, 1954.)*

Rule X-14A-9

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or

necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Note: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

Lapchak v. Barium Steel Corporation, et al.

United States District Court for the Southern District of New York. Civ. No. 91-356. July 20, 1955. Opinion of the court reproduced in full text.

[OPINION OF THE COURT]

DIMOCK, D. J.: Defendant Barium Steel Corporation moves for an order or judgment pursuant to Rule 12(b)(6), F. R. C. P., dismissing the amended complaint upon the ground that it fails to state a claim upon which relief can be granted, and, pursuant to Rules 12(b)(1) and (2), F. R. C. P., upon the grounds that this court has no jurisdiction over its person or over the subject matter. In the alternative defendant Barium seeks an order directing plaintiff to provide security for costs.

Defendant Nelson Gammans too moves for an order or judgment dismissing the amended complaint upon the same grounds presented by defendant Barium and upon the additional ground that plaintiffs' claim is barred by various statutes of limitation and by plaintiffs' laches. This defendant also moves in the alternative for an order directing plaintiffs to provide security for costs.

The action is a derivative stockholders' action brought to recover for the corporation, Barium, damages alleged to have been suffered by Barium and profits alleged to have been realized by the individual defendants as a result of an issue of shares of Barium's stock for an inadequate consideration. Defendants are all alleged to have been officers and directors of Barium during the relevant period of time.

I am convinced that this court has no jurisdiction over the subject matter of this action. Therefore, I discuss only that issue.

The allegations of the amended complaint may be summarized as follows: In or before November 1945 the stockholders of Republic Industries, Inc. conceived "the common plan of foisting their shares on Barium in return for a block of Barium stock of vastly greater value." It was necessary in order that this plan could be carried out that there be effected an increase in Barium's capital stock. The defendant directors of Barium concurred in this plan because they were to share in the resulting profits and the new Barium stock was to be used to cement their control of Barium. A stockholders' meeting was called by Barium for the purpose of voting to increase the number of shares authorized to be issued and in connection with this meeting proxies were solicited. The proxy statements were false and fraudulent under section 14(a) of the Securities and Exchange Act of 1934, 15 U. S. C. § 78n(a), and Rule X-14A-9 of the Securities and Exchange Commission. At the meeting a majority of the stock voted that the authorized shares of Barium be increased from 1,000,000 to 2,500,000 shares. Had no proxies been given there would not have been a quorum at that meeting. Thereafter the exchange plan was carried out and as a result Barium sustained a loss and the individual defendants realized large profits at the expense of Barium. Plaintiffs' sole reliance for federal jurisdiction is placed upon section 27 of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa which provides in material part:

"The district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. . . ."

Let it be assumed that section 14(a) of the Securities and Exchange Act of 1934 creates a civil right of action in behalf of a corporation against violating directors and

officers. Plaintiffs concede that the directors and officers would not be liable as insurers. If this amended complaint stated a claim for damages arising out of a violation of section 14(a) the presence of federal jurisdiction would be clear and the fact that the allegations of the amended complaint also constituted a state created claim would not defeat this jurisdiction. *Bell v. Hood*, 327 U.S. 678. But since plaintiffs concede the absence of insurer liability, the claim, to arise under the Act, must have a causal connection with the alleged violation. Plaintiffs say that it does. They say that it was through the offending proxy statements that proxies were obtained, through use of the proxies that additional shares were authorized, through issuance of additional shares that the exchange was effected and through the exchange that Barium was injured. I cannot agree that this connection is sufficient to support federal jurisdiction.

Even plaintiffs concede that if the proxy statement were followed by a fair exchange the directors would not be liable to the corporation. Also, it is clear that, had the proxy statement been perfectly lawful but followed by an unfair exchange, the directors would be liable for damage sustained and profits realized in violation of their fiduciary duties.

The common plan, as plaintiffs allege it, was to foist a less valuable block of stock of Republic upon Barium in exchange for a more valuable block of stock of Barium. The increased authorization and related false proxy statements were merely incidental to the plan. Since the liability asserted by plaintiffs may be proved without regard to the proxy statements and cannot be proved without regard to the alleged breach of fiduciary duty it is impossible to say that plaintiffs are asserting a right under or created

by a federal law. The allegations as to the proxy statements are either mere surplusage or a mere pretext for assertion of federal jurisdiction. Compare *Gully v. First Nat. Bank*, 299 U.S. 109; *Meyer v. Kansas City Southern Ry. Co.*, 2 Cir., 84 F. 2d 411, cert. denied, 299 U.S. 607, and *Nelson v. Leighton*, D.C.N.D.N.Y., 82 F. Supp. 661 with *Bell v. Hood*, 327 U.S. 678; *Fielding v. Allen*, 2 Cir., 181 F. 2d 163, cert. denied 340 U.S. 817 and *Stella v. Kaiser*, D.C.S.D.N.Y., 82 F. Supp. 301.

The motions to dismiss are granted on the ground of lack of federal jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 402

J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN, L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON, WM. B. PETERS, AND MARC B. ROJTMAN,

Petitioners,

vs.

CARL H. BORAK, FOR AND ON BEHALF OF HIMSELF AND ALL OF THE OTHER COMMON STOCKHOLDERS OF J. I. CASE COMPANY WHO ARE SIMILARLY SITUATED TO HIM,

Respondent,

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW; JURISDICTION; STATUTES AND REGULATIONS INVOLVED.

The petition adequately states the opinions below, the jurisdictional requisites and the statutes involved.

QUESTION PRESENTED.

The complaint charges that a corporate merger with adverse consequences to plaintiff and other shareholders gained shareholder approval because of a proxy statement which contained false and misleading statements and omissions in violation of Sec. 14(a) of the Securities Exchange Act of 1934 (the "Act"). Diversity jurisdiction also exists.

May a federal court, under section 27 of the Act, in an individual non-derivative action, grant complete relief, including damages or rescission?

The Court of Appeals for the Seventh Circuit answered the question "yes". We believe its answer was plainly correct.

STATEMENT.

The facts and proceedings below are stated by the Court of Appeals (Pet. 16-24).

In essence the complaint charges a deprivation of preemptive rights of plaintiff and other shareholders, the result of a merger approved by means of a false and misleading proxy statement and in consequence of illegal and fraudulent conduct on the part of directors and others. Count 1, based on diversity jurisdiction, claims breach of the directors' fiduciary duty to the shareholders. Count 2, based on diversity and federal question jurisdiction, claims that shareholders' rights were violated by the approval of the merger through a false and misleading proxy statement which violated section 14(a) of the Act.

The district court held applicable to both counts a Wisconsin statute requiring security for expenses in derivative actions. The court further held that as to count 2 it could grant only declaratory relief.

The Court of Appeals held that the complaint stated individual, non-derivative claims and that the state security for expense statute was not applicable to either count. The Court of Appeals also held as to count 2 that federal courts have jurisdiction under section 27 of the Act to grant complete retrospective relief, not merely piecemeal, declaratory relief to remedy violations of section 14(a) of the Act.

The petition for certiorari is limited to the scope of relief available under count 2. Thus petitioners' "question pre-

sented" (Pet. 2) questions only whether there is jurisdiction to grant "rescission or damages". It assumes there is jurisdiction to grant declaratory relief.

While criticizing the decision below, petitioners do not ask that certiorari be granted to determine the correctness of the holding that count 1 asserts individual, non-derivative claims to which the state statute is inapplicable.

ARGUMENT.

The petition for a writ of certiorari should be denied: there is no direct conflict of decisions and the decision below is plainly correct.

1. Contrary to petitioners' assertion (Pet. 8-11), there is no conflict between the Courts of Appeals for the Second, Sixth and Seventh Circuits. In *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201 (C.A. 6, 1961) the court held that individual shareholders have an implied right of action under § 14(a) of the Securities Exchange Act of 1934 and reversed an order dismissing the complaint for failure to state a claim. The opinion below holds that an implied individual right of action exists under § 14(a) and is therefore wholly consonant with the holding of the *Dann* case.¹

1. Indeed, the decision below and in the *Dann* case is in complete harmony with a long line of cases holding directly or by implication that a private right of action flows from a violation of section 14(a) of the Securities Exchange Act of 1934. *Central Foundry Co. v. Gondelman*, 166 F. Supp. 429 (S. D. N. Y. 1958); *Rosen v. Alleghany Corp.*, 133 F. Supp. 858 (S. D. N. Y. 1955); *Horwitz v. Balaban*, 112 F. Supp. 99 (S. D. N. Y. 1949); *Tate v. Sonotone*, 5 S. E. 2d 310 (S. D. N. Y. 1947). See also *Mack v. Mishkin*, 172 F. Supp. 885 (S. D. N. Y. 1959); *Textron v. American Woolen Co.*, 122 F. Supp. 305 (D. Mass., 1954); and compare *Brown v. Bullock*, 194 F. Supp. 207, 231 (S. D. N. Y.) aff'd. other grounds, 294 F. 2d 415 (C. A. 2, 1961). This view, in turn, stems from a longer line of cases establishing an implied private right of action under other provisions of the federal securities laws. See, e.g. *McClure v. Borne Chemical Co.*, 292 F. 2d 824 (C. A. 3, 1961), cert. denied 368 U. S. 939 (1962); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E. D. Pa. 1946), 73 F. Supp. 798 (1947); *Geismar v. Bond & Goodwin, Inc.*, 40 F. Supp. 876 (S. D. N. Y. 1941); *Errion v. Connell*, 236 F. 2d 447 (C. A. 9, 1956); and see North, Implied Liability Cases Under the Federal Securities Laws, 4 Corp. Prac. Comm. 1 (1962).

The holding of the *Dann* case and that of the court below that section 14(a) creates an implied right of action for individual shareholders in their own right is not in conflict with *Howard v. Furst*, 238 F. 2d 790 (C.A. 2, 1956), cert. denied, 353 U. S. 937 (1957). In *Furst* the action was brought by a shareholder derivatively—i.e., in the right of the corporation (238 F. 2d at 791). The court held only that a derivative action would not lie under section 14(a). It expressly avoided ruling on the right of individual stockholders to sue in their own right, stating: “* * * we leave that question open * * *” (238 F. 2d at 793). Petitioners’ paraphrasing of the *Furst* case (Pet. 9) omits stating that the court was concerned only with the question whether § 14(a) created any rights for the benefit of the corporation (238 F. 2d at 793).²

In contrast, the court below (Pet. App. 27, 33) and the court in the *Dann* case (288 F. 2d at 208, 210-11) were concerned with actions brought by shareholders in their own behalf to protect their right—not the corporations’—to a full and fair disclosure of all material facts in proxy statements. Hence there is no conflict in any of the decisions.

2. Contrary to petitioners’ assertion (Pet. 11-13), there is no direct conflict between the decision below and the *Dann* case regarding the scope of relief under section 14(a).

(a) The *Dann* case arose on a motion to dismiss the complaint. The only issue before the Court of Appeals for the Sixth Circuit was whether the complaint stated a claim

2. Even if *Furst* were relevant and created an apparent conflict that decision will fall of its own weight without review by this Court. That case has been questioned by other courts which have refused to follow or extend it. Judge Clark of the Court of Appeals for the Second Circuit recently stated: “* * * I suspect that someday we shall have to disavow the much criticized case of *Howard v. Furst* * * *”. *Brown v. Bullack*, 294 F. 2d 415, 422 (C. A. 2, 1961) (concurring opinion). See also *Brown v. Bullack*, 194 F. Supp. 207, 232-234 (S. D. N. Y. 1961); and *Hooper v. Mountain State Securities Corp.*, 282 F. 2d 195, 203 (C. A. 5, 1960), cert. denied, 365 U. S. 814.

to any relief. Since the court held a claim was stated for declaratory relief it was unnecessary to a decision on the motion to discuss the availability of other forms of relief and at the most this discussion was *obiter dictum*.

(b). The court in the *Dann* case reached its conclusion regarding the scope of relief on the basis of lack of diversity jurisdiction. (288 F. 2d at 204, 212, 215.) Here diversity is present.

We do not believe that this court need be concerned with reviewing such *dictum*, especially where it has not persuaded or misled any court of appeals, the Securities and Exchange Commission, or any legal text writer.³

The Securities and Exchange Commission, the agency charged by law with the administration of the relevant federal statutes, filed "an exhaustive brief" below as *amicus curiae* (Pet. App. 27, n. 9) in which it took the position that: (1) a private right of action in shareholders is well established under §§14(a) and 27 of the Securities Exchange Act of 1934 and (2) in such actions federal courts have power to grant full relief including damages or rescission.

So far as we know, no court has been concerned with or applied the *dictum* of the *Dann* case regarding scope of relief except the district court which was reversed by the Court of Appeals below. The decision of the Court of Appeals below that the general grant of jurisdiction to enforce the statute vests the court with power "to award damages or such other retrospective relief . . . as the . . . controversy may require" (Pet. App. 35) is wholly con-

3. Every legal commentary that we have been able to find has criticized the *dictum* of the *Dann* case. See Loss, Securities Regulation (2d ed., 1961), pp. 2029-2032; and also the following notes and comments: 75 Harv. L. Rev. 637 (1962); 62 Columbia L. Rev. 375 (1962); 7 Villanova L. Rev. 125 (1961); 9 U. C. L. A. Law Rev. 232 (1962); 3 Boston College Ind. and Comm. L. Rev. 58 (1961); and 1962 Duke L. J. 151.

sistent with the numerous cases holding that retrospective relief is available in implied liability actions under other sections of the federal securities acts. See, e.g., *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195 (C.A. 5, 1960), cert. denied 365 U. S. 814; *Fratt v. Robinson*, 203 F. 2d 627 (C.A. 9, 1953); *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (C.A. 2, 1951); *Goldstein v. Groesbeck*, 142 F. 2d 422, 426, 427 (C.A. 2, 1944) cert. denied 323 U. S. 737; and *Geismar v. Bond and Goodwin, Inc.*, 40 F. Supp. 876, 878 (S.D.N.Y. 1941).

All of these cases, other than the *Dann dictum*, are descendants of the numerous decisions of this Court holding that "federal courts have the power, under a general grant of jurisdiction to enforce a federal statute, to grant all of the relief which may be commensurate with the effective enforcement of the statute and the protection of rights created thereby, notwithstanding the failure of the statute to specify the remedies which may be employed" (Pet. App. 33). See, e.g., *Bell v. Hood*, 327 U. S. 678, 684 (1946); *Deckert v. Independence Shares Corp.*, 311 U. S. 282, 288 (1940); *Sola Electric Company v. Jefferson Electric Company*, 317 U. S. 173, 176 (1942); *Porter v. Warner Holding Co.*, 328 U. S. 395, 398 (1946); *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110, 128 (1948); *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957); and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 291 (1960).

We think that in the future if the issue of the scope of relief is squarely raised again lower courts will follow the holding below, not the *dictum* in *Dann*. If we are proved wrong, this Court may at that time exercise its discretionary power of review. As of now the question is not ripe for review.

CONCLUSION.

The opinion below is not in conflict with any other decision and is manifestly correct. Accordingly, respondent respectfully submits that the petition for a Writ of Certiorari should be denied.

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September 20, 1963.

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No. 402

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IN THE

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OCTOBER TERM, 1963

J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN,
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vs.

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other common stockholders of J. I. Case Company who are
similarly situated to him,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR J. I. CASE COMPANY

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Respondent.

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BRIEF FOR J. I. CASE COMPANY

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 317 F. 2d 838. The opinion of the United States District Court for the Eastern District of Wisconsin is not reported, but is set forth at page 200 of the Record.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1963. The petition for a writ of certiorari was filed August 26, 1963, and was granted on November 12, 1963 (84 S. Ct. 195). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Did the Court below err in holding that there is a private right of action for damages or other retrospective relief under Sections 14(a) and 27 of the Securities Exchange Act of 1934 for use of false and misleading proxy material?

II. Did the Court below err in refusing to apply the Wisconsin security for expenses statute, even if such an action is held to lie?

STATUTES INVOLVED

Pertinent provisions of the Securities Exchange Act of 1934 (15 U.S.C. §78) are set forth as Appendix A. Section 14(a) (15 U.S.C. §78n) provides:

“(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”

The Regulations prescribed by the Securities and Exchange Commission under Section 14(a) are set forth as Appendix B.

The Rules of Decision Act (28 U.S.C. §1652) provides:

"State laws as rules of decision. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944"

Section 180.405(4) Wisconsin Statutes provides:

"(4) In any action brought in the right of any foreign or domestic corporation by the holder or holders of less than 3 per cent of any class of shares issued and outstanding, the defendants shall be entitled on application to the court to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive."

STATEMENT

On or about September 6, 1956, the boards of directors of J. I. Case Company (Case), a Wisconsin corporation, and American Tractor Corporation (ATC), a New York corporation, approved a plan for merger pursuant to the Wisconsin Corporation Law. (R. 3, 21) Case, a major producer of farm equipment, had its common stock listed on the New York Stock Exchange. (R. 24) Common Stock of ATC, a small but growing manufacturer of crawler tractors and other light earth-moving equipment, was traded on the American Stock Exchange. (R. 24) Pursuant to the plan of merger, Case common stock and a new Case preferred stock were exchanged for ATC stock at a rate which approximated the relative stock market valuations of the respective common stocks at that time. (R. 27)

This lawsuit arose out of plaintiff's dissatisfaction with the merger as proposed in the fall of 1956. The plaintiff owned 2,000 of the 2,262,766 shares of Case common stock outstanding. (R. 1) From and after the middle of September 1956, some two months before the Case stockholders' meeting, the plaintiff and his attorney were in frequent communication with Case regarding the merger. Case cooperated fully, even furnishing the plaintiff with a special mailing of the Proxy material and a certified list of Case shareholders. (R. 88)

Proxy material describing the proposed merger was not challenged by the Securities & Exchange Commission and was mailed to Case shareholders on October 15, 1956. (R. 87) Since the shareholders' meeting to consider the merger was scheduled for November 15, 1956, the plaintiff still had a month in which to bring the allegedly false and

misleading proxy statement to the attention of the Commission and enlist its power to compel a correction of the proxy statement before the proxies given pursuant thereto were used. (R. 87) The complaint and all subsequent pleadings are silent as to why the plaintiff elected not to pursue this remedy. Instead, the plaintiff commenced this suit in the Eastern District of Wisconsin on November 13, 1956, and defendant Case was served November 14, 1956, only one day before the meeting at which the Case stockholders considered the proposed merger. (R. 88) Among other things, the plaintiff alleged in his complaint that false statements had been made in the proxy statement (R. 6); that the book value of Case common stock would be diluted (R. 7); that the merger was against the best interests of the Case stockholders (R. 8); that stock was being issued for less than par value. (R. 10); that the stock and assets of ATC were over-valued by the Case directors (R. 11); and that he had no adequate legal remedy (R. 15). The plaintiff sought to enjoin the merger and moved for a temporary restraining order. (R. 16). At the time of the merger Case had 8,241 common stockholders. Since much Case stock was owned in street name by brokerage firms, the number of beneficial shareholders was much higher. No other stockholder has joined with the plaintiff or challenged the legality of the merger in any other proceeding.

In its written order entered November 29, 1956, denying the plaintiff's application for a temporary restraining order, the district court held, *inter alia*, that there was no evidence that the merger was illegal or fraudulent or that it would irreparably damage the plaintiff (R. 88); that the plaintiff had failed to do equity in not making more timely application (R. 88); and that the right of appraisal (Sec-

tion 180.69 Wisconsin Statutes, see Appendix C), an integral part of the Wisconsin merger statutes, afforded the plaintiff an adequate remedy at law. (R. 88). This denial was not appealed.

The plan of merger was approved by 91.8% of the common stockholders present and voting at the meeting of November 15, 1956, and the merger was consummated January 10, 1957. (R. 106)

Case acted to bring the action speedily to trial but extensive discovery proceedings intervened. (R. 154). Following this period of discovery, the plaintiff filed his first amended and supplemental complaint on April 1, 1958, adding 29 additional defendants. (R. 111) This complaint reiterated the allegations of fraud (R. 140) and breach of fiduciary duty (R. 126) of the original complaint, as well as re-alleging that plaintiff represented a class. (R. 112) For relief the plaintiff prayed that the merger be declared void, that Case be divested of ATC, that persons who received Case shares pursuant to the merger be made to surrender them, that new shares be issued, and that other appropriate equitable relief be granted. (R. 143-145)

On April 7, 1958, Case moved for security for expenses under §180.405(4) Wis. Stats. (R. 153). On October 23, 1958, the court ordered the plaintiff to post security for expenses in the amount of \$75,000, but upon plaintiff's application granted leave to amend the complaint so as not to come within the Wisconsin statute. (R. 151) However, the plaintiff failed either to amend or post security, and the court granted Case's motion to dismiss on September 17, 1959. (R. 153)

Since that date, the history of this action consists entirely of the plaintiff's efforts to avoid posting security for expenses by successive revisions of his complaint without, however, alleging any new material facts.

The District Court saw through these attempts but on each application permitted the plaintiff every opportunity to replead. Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, on March 10, 1960 the court vacated its judgment of dismissal so that the plaintiff could file a second amended and supplemental complaint. (R. 158) The plaintiff filed this complaint, his third in the case, on July 1, 1960. (R. 160) Again purporting to represent all Case shareholders similarly situated (R. 160), the plaintiff reiterated his claims for fraud and breach of fiduciary duty (R. 167).

For the first time, some three and one-half years after the merger, plaintiff claimed deprivation of his pre-emptive rights (R. 163) and asserted a right to retrospective relief under the Securities Exchange Act of 1934 (hereafter called "the Act") (R. 162, 176) The plaintiff prayed for damages from the Case directors and others and equitable relief to undo the events of the past four years, including a decree ordering Case to issue new stock to the plaintiff and fellow members of his class so as to compensate for the violation of pre-emptive rights, and a declaration that the merger and all agreements made pursuant thereto were void. (R. 176)

Case again moved for security for expenses and the court ordered the plaintiff to file a third amended and supplemental complaint (hereafter called "the Complaint") separating his cause of action based on diversity from his cause of action based on claimed violations of Federal laws. (R. 178) On January 12, 1962, the plaintiff did file such a complaint, (R. 179) his fourth in this action. The District Court found that Count I of the third amended and supplemental complaint alleged the same facts to which the court previously had applied the Wisconsin security for expenses statute. (R. 208)

Count II asserted claims under both Section 10(b) and Section 14(a) of the Securities Exchange Act. (R. 197) The District Court held that the allegations as to 10(b) were surplusage and inconsistent with the other allegations of fact of the complaint, and that it had jurisdiction only to render a declaratory judgment as to violations of 14(a), and could grant retrospective relief under Wisconsin Law, but not under 14(a). (R. 211, 212) To the extent Count II prayed relief other than a declaratory judgment the court held that it stated a derivative cause of action under Wisconsin law, which made it subject to the Wisconsin security for expenses statute. Accordingly, the District Court ordered the plaintiff again to post security in the amount of \$75,000, pursuant to §180.405(4) Wisconsin Statutes. (R. 212) Again the plaintiff failed to comply with the order of the court and, on October 1, 1962, the District Court ordered the third amended and supplemental complaint dismissed, except to the extent Count II might be construed as a suit for a declaratory judgment. (R. 214, 215) The plaintiff thereupon took an interlocutory appeal to the Court of Appeals for the Seventh Circuit. (R. 216)

The Seventh Circuit decided three questions. First, it held that the Wisconsin security for expenses statute did not apply to Count I because that Count stated a non-derivative cause of action. (R. 227) Second, it affirmed the holding of the District Court that Count II did not state a cause of action under Section 10(b) of the Act. (R. 229) Third, it held that the Wisconsin security for expenses statute did not apply to Count II. (R. 234) The Seventh Circuit reasoned that the state statute was inapplicable because a federally-created private action exists for retrospective relief for violations of Section 14(a) of the Act. (R. 234) Pursuant to these findings, the Seventh Circuit reversed the order dismissing the plaintiff's third amended and supplemental complaint. (R. 234, 235)

SUMMARY OF ARGUMENT.

The corporate defendant, J. I. Case Company, is not the nominal party characteristic of cases of this nature. It represents the thousands of stockholders who approved this merger and whose money over the past seven years has been invested in the merged enterprise and who would be materially prejudiced if the plaintiff were to prevail in having the merger declared void. The Company's present position in the case and on this appeal reflects the interests of its stockholders only. The present management of the Company is independent of the individual defendants who were directors at the time of the commencement of the suit. None of the present executives of the Case Company has ever been a defendant in this action. The only present Case director who has ever been a defendant is Mentor Krause, who was formerly the attorney for ATC.

J. I. Case Company actively sought in the District Court the security bond provided for by Wisconsin law and pressed this appeal because, under Section 180.407 Wisconsin Statutes, the Company will be required to reimburse the director-defendants for their legal expenses if they are successful in defending the case.

The Seventh Circuit reversed the order of the Eastern District of Wisconsin, which had dismissed the third amended and supplemental complaint for plaintiff's failure to post the required security for expenses. The Seventh Circuit held that because Count II stated a federally-created action, the Wisconsin security for expenses statute should not have been applied by the District Court. J. I. Case Company contends that the Seventh Circuit erred both in holding that a federally-created action exists for violations of Section 14(a) and in holding that the Wisconsin security for expenses statute does not apply if the action is federally created.

The federal cause of action which the plaintiff attempts to assert does not exist. The Securities Exchange Act does

not create a private action for retrospective relief for violations of Section 14(a), either expressly or impliedly. The failure of Congress to provide for such an action must be interpreted as a manifestation of its intention that there should be no such action. The scheme of the Act is to provide before-the-fact policing of proxy solicitation and the limited civil liability created by Section 18(a) for proxy rule violations. Congress did not create a new federal private action for retrospective relief because it recognized that shareholders who are harmed by fraudulent proxy solicitation have adequate remedies, including retrospective relief, under state laws of fraud, misrepresentation, and breach of fiduciary duty.

Under the Securities Act every means is afforded shareholders to obtain full disclosure in advance of corporate action. The Act authorizes the promulgation of proxy rules and it provides for the advance clearance of proxy material by the Securities and Exchange Commission and for court action to bar the use of proxies or the holding of a stockholders' meeting based upon a materially false and misleading proxy statement. We do not question the private right of shareholders under the Act, in addition to the rights of the Commission, to seek prospective relief of injunction in such circumstances.

On the other hand, to sanction a new Federal cause of action for retrospective relief, where appropriate remedies already exist under state-based law in the event of fraud or breach of fiduciary duty, would be an unwarranted extension of Federal jurisdiction. It would create difficult problems in accommodation of State and Federal law and would force Federal courts to deal with the internal affairs of corporations, which traditionally have been governed by the law of the state of incorporation and have been the responsibility of the state courts.

Sanction of the action requested by the plaintiff, simply to allow him to escape the state security for expenses statute, is unjustifiable on principle and as a practical policy.

Even if a federal cause of action for retrospective relief for violations of Section 14(a) were created, the Wisconsin security for expenses statute should still be given full effect.

Federal law is interstitial in character. This is acknowledged by recent decisions of this Court, the commentators, and the Rules of Decision Act. This Act provides that state law shall govern in civil actions in the federal courts where applicable, unless the federal Constitution or treaties or Acts of Congress require or provide that state law shall not control. That it is a basic prerogative of the states to regulate corporate affairs, including internal shareholder-management relations, has long been recognized in diversity cases. This state prerogative remains effective despite the fact that the right asserted is federal in origin.

The Rules of Decision Act establishes a guide for accommodating state and federal law; it embodies a judgment that federal law should not displace any more state law than is necessary to accomplish the federal policy involved. It follows that the Wisconsin statute should be applied in this case unless it is inconsistent with the policy of the Securities Exchange Act or some other federal law.

This Court has already held that state security for expenses statutes are not inconsistent with the policy of Rule 23(c) of the Federal Rules of Civil Procedure. Neither is the Wisconsin statute inconsistent with the policy of the Securities Exchange Act. In Section 18(a), which explicitly provides a far less drastic liability for use of a false and misleading proxy statement than the plaintiff here demands, Congress furnished its own security for costs provision. Since every indication of federal policy strongly favors security for expenses, it was error for the Seventh Circuit not to enforce the rights conferred upon corporate defendants by the Wisconsin security for expenses statute.

ARGUMENT.

I.

THE COURT BELOW ERRED IN HOLDING THAT THERE IS A FEDERALLY-CREATED PRIVATE ACTION FOR RETROSPECTIVE RELIEF FOR VIOLATIONS OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT.

A. The Failure of Congress to Create a Federal Right of Action for Retrospective Relief for Violations of Section 14(a) Was Intentional.

Section 14(a) of the Securities Exchange Act (15 U.S.C. §78n) proscribes proxy solicitation in contravention of the rules which the SEC is authorized to make. The Act gives the SEC power to enforce its rules, either prospectively by injunction or retrospectively by criminal action. It does not contemplate private enforcement for retrospective relief.

On its face, Section 14(a) is a typical regulatory statute. It should be construed in the same manner as other such statutes, for example the Federal Safety Appliance Acts.

“When Congress in the Safety Appliance Acts imposed only penal sanctions for the observance of statutory safeguards enacted broadly for the protection of railway employees, passengers, and even travelers at crossings, and in a related act (the Employers’ Liability Acts) created a private right of action only in employees engaged in interstate commerce, as defined, fairly obviously it cannot be maintained as a matter

of statutory interpretation that Congress has also created a statutory right of action in favor of intrastate employees, or passengers, or travelers at crossings, injured as a result of violation by the railroad of the Safety Appliance Acts."

Jacobson v. New York, N.H. & H.R. Co., 206 F. 2d 153, 156 (1st Cir. 1953), *Magruder, J., aff'd per curiam*, 347 U.S. 909 (1954). For similar treatment of the application of Clayton Act civil remedies to Section 3 of the Robinson-Patman Act, see *Nashville Milk Co. v. Carnation Company*, 355 U.S. 379 (1958), *Harlan, J.*

The Safety Appliance Acts decisions are analogous to this case. Like the Safety Appliance Acts, Sections 9(e), 16(b), and 18(a) of the Securities Exchange Act expressly provide private remedies. Section 9(e) (15 U.S.C. §78i) makes willful manipulators of security prices liable in damages to persons who have purchased or sold a security at a manipulated price. This Section is clearly inapplicable here. Section 16(b) (15 U.S.C. §78p) makes the profits of "insider" speculation recoverable by the issuer. This Section also does not apply to this case. Section 18(a) (15 U.S.C. §78r) gives the right to recover damages to persons who, in reliance upon a knowingly false and misleading proxy statement, purchase or sell a security at a price which is affected by the statement.

The plaintiff in the instant case does not come within the class of persons entitled to damages under Section 18(a), because he did not buy or sell in reliance upon a false or misleading proxy statement. Traditional methods of statutory construction, particularly the rule of *expressio unius*, completely negate any inference that the Act was intended to create a private civil remedy for violations

of Section 14(a). In enacting Section 18(a), Congress certainly realized that shareholders in a company which is party to a merger would also be injured by fraudulent proxy solicitation. Since no express or implied provision was made in either Section 14(a) or Section 18(a) for the relief of such shareholders, the legislative intent was clearly to leave the remedy for such injuries to the common law, which has traditionally furnished relief from fraud and breach of fiduciary duty. This conclusion was reached by Judge Medina in *Howard v. Furst*, 238 F. 2d 790, 793 (2d. Cir. 1956).

"We find nothing in the language of Section 14(a) or in the legislative history of the Securities Exchange Act of 1934 to warrant an inference that it was the intention of the Congress to create any rights whatever in a corporation whose stockholders may be solicited by proxy statements prepared in contravention of the statutory mandate.

"Ambiguous or equivocal language would hardly be sufficient to support an innovation of such far reaching effects. *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254. Here the statute authorizes the formulation of rules and regulations 'in the public interest or for the protection of investors.' There is literally nothing to support the view that any substantive rights were created for the benefit of the corporation.

"The Securities Exchange Act of 1934 is a comprehensive piece of legislation of wide scope. Significantly, where it was intended to create a right of action in favor of the issuer corporation, the statute makes express provision therefor, as in the case of Section 16(b), 15 U.S.C.A. §78p(b), relative to short-swing profits. And see *Birnbaum v. Newport Steel Corp.*, 2 Cir., 193 F. 2d 461, certiorari denied 343 U.S. 956, 72 S. Ct. 1051, 96 L. Ed. 1356."

The Seventh Circuit, in declaring the existence of a federal private action, relied upon *Bell v. Hood*, 327 U.S. 678 (1946):

"For the achievement of that purpose, the jurisdiction conferred by Section 27 must be broad enough to effectively protect that right. Thus, it is said in *Bell v. Hood* . . . that federal courts have the power, *under a general grant of jurisdiction to enforce a federal statute*, to grant all the relief which may be commensurate with the effective enforcement of the statute and the protection of the rights created thereby, notwithstanding failure of the statute to specify the remedies which may be employed." (R. 233, emphasis supplied.)

We submit that this application of *Bell v. Hood* was erroneous, because Section 27 (15 U.S.C. §78aa, see appendix A) is not a "general grant of jurisdiction" to the courts to enforce the Act, but merely a designation of the forum. Section 27 does not itself create any liabilities, but simply tells persons who wish to enforce liabilities which the Act has created that they must sue in federal court.

"The (Securities Exchange Act) does have a general provision on jurisdiction, venue, and service (Section 27) to take care of *actions by the Commission and the private actions expressly created by the statute.*"

Loss, "The SEC Proxy Rules and State Law," 73 Harv. L. Rev. 1249, 1270 (1960), emphasis supplied.

There are many reasons why Congress did not create a new federal private remedy for retrospective relief for violations of Section 14(a), and why the Courts should not speak where the legislature was silent. These reasons will be developed hereinafter. Suffice it for the present to say that Congress intended to create no new action for such violations.

B. Creation of a Federal Private Action by the Court Would Not Contribute to the Effective Enforcement of Section 14(a).

The axiom that every right has a remedy does not answer the question which the instant case presents. Here the issue is not whether there is to be a remedy, but whether there is to be a new federal remedy duplicating the existing state common law and statutory remedies. Even if the *Bell v. Hood* principle were applicable, the Seventh Circuit's opinion concedes that the Court could properly create a new civil remedy for violation of Section 14(a) only if "effective enforcement of the statute and the protection of rights created thereby" require it. (R. 233). Thus the decision whether or not to create a private action, even under the approach taken by the Seventh Circuit, must be based upon an appraisal of policy considerations.

"When neither the statute nor the common law authorizes an action and the statute does not expressly deny it, the court should first realize that it is being asked to bring into existence a new type of tort liability on the basis of its appraisal of the policy considerations involved.

"Even when . . . countervailing policies are absent, a court should not analogize blindly and make tortious all conduct which the statute denounces as criminal. A court may well be justified in granting a civil remedy only for an intentional or negligent invasion of the protected interest where the criminal liability imposed by the statute is absolute."

NOTE, "The Use of Criminal Statutes in the Creation of New Torts," 48 Col. L. Rev. 456, 459 (1948), emphasis supplied.

The Seventh Circuit seems to have assumed on faith that a private action here would be a good thing. While acknowledging that policy considerations must be appraised, the Seventh Circuit's opinion is completely devoid of any analysis of the countervailing factors involved in creation of the federal private action demanded by the plaintiff. Examination of this aspect of the problem will reveal that neither justice nor policy reasons favor creation of such a federal action. Creation of a private action would not assist at all in the effective enforcement of Section 14(a). Moreover, it would have many highly undesirable effects, especially if retrospective relief is allowed.

The purpose of Section 14(a) and the rules thereunder is to increase the effectiveness of Securities & Exchange Commission surveillance over the use of proxies, that is, to prevent fraudulent use of the proxy device in its inception. The single basic duty promoted by all the procedural safeguards of 14(a) and the Rules, is the duty not to defraud; the scheme of the statute is not to abandon the common law standard, but to strengthen it by requiring full disclosure of all material facts in proxy statements. To accomplish this, injunction proceedings were created by the Act. (15 U.S.C. §21, see Appendix A). Except for the purpose of implementing the policing function of the Commission, no new duties were created by the Act. The fact that the Proxy Rules apply only to those corporations subject to the Act is conclusive that their function is to aid the SEC rather than to change the primary right-duty relationship of shareholders and proxy solicitors in general.

In creating the Securities & Exchange Commission for preventive regulation, Congress apparently recognized the enormous problems which arise in framing retrospective relief (see p. 19). The federal criminal sanctions, (15

U.S.C. §78ff, see Appendix A), the complete state-based remedies, and the policing powers granted the Commission serve as an adequate deterrent to violations of the Rules.

The gravamen of a shareholder's complaint for retrospective relief must be fraud, misrepresentation, breach of fiduciary duty, or the like. Not only is there no need for a new federal private action, but such action, if created, would have to measure the allegations by traditional state-based standards of conduct. As Judge Dimock has so aptly observed:

"Even plaintiffs concede that if the Proxy statement were followed by a fair exchange the directors would not be liable to the corporation. Also, it is clear that, had the proxy statement been perfectly lawful but followed by an unfair exchange, the directors would be liable for damage sustained and profits realized in violation of their fiduciary duties."

"... Since the liability asserted by plaintiffs may be proved without regard to the proxy statements and cannot be proved without regard to the alleged breach of fiduciary duty it is impossible to say that plaintiffs are asserting a right under or created by a federal law. The allegations as to the proxy statement are either mere surplusage or a mere pretext for assertion of federal jurisdiction."

See *Lapchak v. Sisto*, CCH Fed. Sec. L. Rep., Par. 90, 721 (S.D.N.Y. 1955), Dimock, J.

See also the language of Judge Medina in *Howard v. Furst*, 238 F. 2d 790, 794 (2d Cir. 1956):

"The allegations with reference to the proxy statement constitute a mere excrescence or superfluity, tacked onto what are otherwise sufficient allegations of a claim for relief under New York law."

The simple fact that proxies may be involved does not justify transferring a fraud action from state law to the exclusive jurisdiction of the federal courts.

**C. Creation of a Federal Private Action by the Court
Would Have Many Adverse Consequences.**

Creation of a private action for violation of Section 14(a) would open up a large area, now totally devoid of any guidelines, which would have to be occupied by federal common law. At present, persons harmed by fraudulent proxy solicitation have their remedy under a body of law the sources of which are state-based. Section 14(a) and the proxy rules lie superimposed upon this body of law. See Loss, "Securities Regulation" (2d Ed. 1961), p. 973. The existing remedial system is a comprehensive one, having grown with common law vitality. The departure urged by this plaintiff, besides inviting chaos in the entire area, runs counter to the basic principle of our federal system, which traditionally classifies federal law as interstitial in character. See Hart, "The Relations Between State and Federal Law," 54 Col. L. Rev. 489 (1954). Federal law should properly be extended only into those areas which are appropriate by reason of a need for uniformity or some other distinctly federal policy. No such policy appears in favor of the extension of federal law into the remedial aspects of proxy law. The legislative scheme of the Securities Exchange Act, which is preventively oriented, is satisfied without this extension. The problems of the federal system are among the most difficult and numerous facing the courts today; they should not be multiplied simply to allow plaintiffs to escape state security for expenses statutes. Unwarranted extensions of federal law of this nature have a debilitating effect on the vitality of the federal system and are undesirable and improper *per se*. *Dann v. Studebaker-Packard Corporation*, 288 F. 2d 201 (1961), Boyd, J., noted this effect and held that no

federal action would lie for retrospective relief for violations of Section 14(a):

"... should we hold that the federal courts have jurisdiction, quite apart from diversity of citizenship, to determine matters of state law which are wholly independent of the federal issues before the Court, we would erode even further the equally vital principle of separate sovereignties which underlies the Constitutional and statutory definitions of 'the judicial power of the United States.' Furthermore, in these days of already overburdened federal trial dockets, it might well be a disservice to the federal judiciary to extend its domain into an area so predominantly governed by state and local law. This, we are unwilling to do." 288 F. 2d 201, 214 (1961).

The practicalities of the situation bear this out. Great and unnecessary problems of federal corporation law will be created. The initial problem is how much of the field to occupy. How much existing state-based law of corporations, fraud, and fiduciary relationships is to be abrogated? Proxy solicitation is necessarily very closely interrelated with fundamental corporate transactions. Proxies are an integral part of the voting mechanism of publicly held corporations, and shareholder approval is required by state laws for mergers, dissolutions, reorganizations, large purchases or sales of assets and the like, not to mention elections of directors. If retrospective relief of the sort demanded by this plaintiff is to be available for any alleged violation of the Act, the legal incidents of all these transactions will be affected.

Except as affected by government antitrust suits, the validity of these vital corporate transactions is today entirely determined by state law. Great uncertainty would follow the creation of a federal private action such as is urged here. Two bodies of law would be involved in every

fundamental corporate transaction, one having displaced the other to an unknown degree. Although the common law is most adept at growth through elaboration, that process depends upon the existence of background law upon which to elaborate. Creation of the action urged here would leave a large area which could only be developed in a random manner as the cases happened to present themselves.

The nature of the action created would contribute a great deal to this uncertainty. Until this Court has indicated in an appropriate case that civil liability would not extend beyond the criminal liability expressly created by Section 32 of the Act, that is, that there would be no civil liability for unintentional non-compliance with the Act or the rules, public corporations, which must make use of proxies, will live in a state of uncertainty. Even to clear up this point would not greatly improve the situation, since the need to prove willfulness would probably be a slight obstacle for a private litigant, who does not have to meet the same standards of persuasion which safeguard the criminal defendant. See Loss, *Securities Regulations*, 946, Note 348, and 1039 (1961). To further complicate the problem, no effective limitations period is provided by the statute. Should state limitations periods be borrowed? If so, from which state? It is argued *infra*, p. 28,^o that state security for expenses statutes should be borrowed. Should an appraisal statute which is an integral part of the state merger law under which the merger was consummated be applied, or may the federal court ignore it? Will the defenses available at common law or equity retain their validity? Will class actions lie?

In addition to problems of defining the extent of preemption, the federal courts would be required to interpret a great deal more state law because of the interrelation of proxies and other corporate law and the doctrine of pen-

dent jurisdiction. Problems of accommodation would be rife. The issue of when to interpret state law and when to pre-empt it with federal law would be persistent.

Jurisdictional problems would multiply. Under the theory the Seventh Circuit applied, the federal courts would be given exclusive jurisdiction over the private action sought to be created. Would the plaintiff be barred from suing in state court for common law fraud because his complaint recites a violation of the proxy rules? If this were so, the greatest degree of pre-emption would be realized. If not, the chief result would be to create additional opportunities for forum-shopping, which would result in the creation of further chaos in the law of proxy solicitation. If the plaintiff were not allowed to sue in state court for common law fraud, would not the jurisdiction of the state court to construe its own corporate statutes be completely abrogated? These and other questions will remain open, to add to the uncertainty, until this Court has heard a number of cases on appeal from the highest courts of the states. Even after that, virtually every case involving proxy solicitation will present one or more questions potentially reviewable of right by this Court. Thus the case load of the federal judiciary will be increased in two ways. Actions under the new liability will be presented to the trial courts while many questions appealable to this Court will be created in state courts.

Even more baffling problems might arise if it were held that Section 27 does not confer exclusive jurisdiction on the federal courts. In such event, the burden of more elaboration is thrust upon the entire judicial system, state as well as federal. If the action were held to be based on the general common law of the states, virtually nothing would be gained but trouble, as the state courts could be expected to continue to apply their existing standards.

If it were held to be a federal common law question, the same substantive problems would exist for the courts, plus some very bothersome jurisdictional ones. Exclusive jurisdiction might or might not obtain, so that state courts might often be asked to enforce the federal common law liability. Whenever they did, more reviewable questions would arise; the task of maintaining uniformity, which would then be the duty of this Court, might prove formidable.

The plaintiff's complaint asks that the merger, which was consummated in 1957, be declared void. (R. 197) Plaintiff takes the extreme position that Section 29(b) of the Act (15 U.S.C. §78cc, see appendix A), which declares contracts made in violation of the Act or the Rules "void," makes this entire merger automatically void. The merger agreement entered into under Wisconsin law was not in any sense made in violation of the Act or Rules. Moreover, such an extraordinary upsetting of a corporate structure is possible today only for antitrust violations, and, significantly, only when the antitrust suit is initiated by the Justice Department. It is worth noting that even though Section 16 of the Clayton Act (15 U.S.C. §26) expressly confers upon private plaintiffs the right to sue for injunctive relief for violations of the antitrust laws, the courts have uniformly refused to grant mandatory injunctions for divestiture, dissolution, and the like at the instance of private plaintiffs. Yet this plaintiff claims such a right to himself where there is no statutory grant of any private remedy.

If corporations which merge are not to be unscrambled, a federal doctrine of *de facto* corporate transactions will have to be developed. If the court decides no mandatory equitable relief is available, what is left for plaintiffs? Damages will be derivative in virtually every case, unless nominal damages are to be allowed the individual shareholder for violations of the proxy rules. If the shareholder

er suffers any other compensable injury, what is it and how is it to be measured?

If a federal private action is to be implied, to what extent will the traditional defenses be available? For example, the defense of *volenti non fit injuria* seems to apply to a shareholder's suit of this kind. Where there is any sort of a market for the securities of the company involved, which there is for virtually every public corporation, the disgruntled shareholder can easily get his money out of the corporation through the market, or by use of the dissenting shareholder's right of appraisal. (Section 180.69, Wisconsin Statutes). This appraisal right is an integral part of the Wisconsin merger statutes, pursuant to which this merger took place. Most other states have similar provisions in their merger statutes. Where the price of the shares has risen after a transaction which results from an allegedly invalid proxy solicitation, the investor in a public corporation has not been injured. As Appendix D shows, the price of J. I. Case Company common stock, which is traded on the New York Stock Exchange, rose steadily for some three years following the merger. Thus the plaintiff could have made a profit over the price prevailing before the merger by merely calling his broker.

The burden on the Commission would be greatly increased by allowing private actions, since the application of the proxy rules would surely become confused under a barrage of strike suits in diverse courts throughout the land. A haphazard, random pattern would emerge where now there is comprehensive and effective regulation. The Commission would no doubt feel compelled to observe a great number of lawsuits, and to file *amicus* briefs in many of them in an effort to fulfill its regulatory duty. An additional problem for the courts and the Commission would be what effect, if any, to give Commission clearance of a proxy statement in subsequent private litigation brought to enforce the new liability.

The effect on corporations must be considered as well as the problems created for the courts. In an area which demands great certainty, corporate decision-makers would be forced to work without any guidelines to actions. To render a merger void, a plaintiff with the priceless advantage of hindsight would only have to show the omission of one material fact in a proxy statement, notwithstanding that thousands of other material statements were correctly set forth. This would place corporate planners in an impossible situation. Moreover, District Courts would have the power and obligation to remodel mergers long after their consummation, in accordance with their particular views of equity and finance.

The effect on corporate financing would certainly be adverse. The overhanging threat of divestiture or other equitable relief would make normal financing unavailable to any newly-consummated merger. At the very least, money markets and securities exchanges would thus be afflicted with an inherent instability. The use of proxies is essential to the continued healthy existence of public corporations in our economy; creation of the action demanded by this plaintiff would greatly impair if not destroy their usefulness.

It is also clear that strike suits would be greatly encouraged, especially if security for expenses is not to be demanded. The very reason for enactment of security for expenses statutes has been to curb the alarming increase of strike suits in recent years.¹ It would be a step backward to permit a new type of action without the accompanying restraint which has been found so necessary.

¹ See Wood, Survey and Report Regarding Stockholder's Derivative Suits (New York State Chamber of Commerce 1944). On the ambivalent nature of minority shareholders' suits in general, see also the opinion of Judge Wyzanski in *Levitt v. Johnson*, CCH Fed. Sec. L. Rep., Par. 91,304 (D. C. Mass. 1963).

II.

THE WISCONSIN SECURITY FOR EXPENSES STATUTE APPLIES EVEN IF A PRIVATE ACTION FOR RETROSPECTIVE RELIEF FOR VIOLATIONS OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT IS CREATED.

Even if Count II does state a federally-created claim for retrospective relief, the claim it states is derivative, as the Seventh Circuit seemed to realize. Since the claim is derivative, the Wisconsin security for expenses statute must be applied.

Unless the plaintiff is contending only for nominal damages for a technical violation of his rights, the gravamen of his complaint must be injury to the corporation.

"The action is derivative, i.e. in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.

"... If damages to a stockholder result indirectly, as the result of injury to the corporation and not directly, he cannot sue as an individual."

Fletcher Cyc. Corp. (1961 Rev.Ed) §5911, at p. 370.

Since *Smith v. Hurd*, 53 Mass. (12 Met.) 371, (1847), it has been uniformly held that damages to corporate assets are not injuries in the first instance to shareholders.

"The basic criterion for determining whether an action is individual or derivative should be the impact of the alleged injury on the corporation."

Note, "Developments in the Law—Multiparty Litigation in the Federal Courts," 71 Harv. L. Rev. 874, 943 (1958).

The same note also lists the following as typical derivative actions: actions charging directors with waste of corporate assets through mismanagement or breach of fiduciary duty, *Cohen v. Young*, 127 F. 2d 721 (6th Cir. 1942), *Converse v. United Shoe Mach. Co.*, 209 Mass. 539, 95 N.E. 929 (1911); actions attacking contracts as *ultra vires* the corporation, *Dickinson v. Consolidated Traction Co.*, 114 F. 232 (C.C.D.N.J. 1902), *aff'd* 119 Fed. 871 (3d Cir. 1902), *cert. denied*, 191 U.S. 567 (1903); and actions against outsiders for wrongs against the corporation, *Green v. Victor Talking Mach. Co.*, 24 F. 2d 378 (2nd Cir. 1928) (*dictum*), *cert. denied*, 278 U.S. 602 (1928).

Although the plaintiff alleges that the false and misleading proxy statement was used to deprive him of his pre-emptive rights, this is really surplusage to Count II of his complaint. Count II asks for damages for the violation of Section 14(a) and that the merger be declared void. If the proxy was in fact false and misleading, the individual defendants may be liable in damages to the Company. Since it is in the first instance the Company which suffered, if anyone did, the proper way in which to make the plaintiff whole is to make Case whole. Nothing would be gained but confusion and injustice to the creditors and present shareholders of Case by attempting to allocate damages from the Company to the members of the plaintiff's so-called class. By analogy to actions brought to void *ultra vires* contracts, it is even clearer that if anyone has a right to have the merger voided, it is the Case Company, which plaintiff alleges has been victimized, and that if the plaintiff has any colorable ground for asserting such a right, it is only on behalf of the Company.

The security for expenses statute confers a right upon Wisconsin corporations in exercise of the state's power to regulate the incidents of the stockholder-corporation re-

lationship. The Wisconsin Court has held that the Wisconsin Corporation Law is a part of the stockholder's contract with the corporation. *Milwaukee-Sanitarium v. Swift*, 238 Wis. 628, 300 N.W. 760 (1941); *Johnson v. Bradley Knitting Company*, 228 Wis. 566, 280 N.W. 688 (1938).

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949), held that federal courts must apply state security for expenses statutes in diversity cases. Mr. Justice Jackson, speaking for the Court, held that the states have plenary power over derivative actions:

"The very nature of the stockholder's derivative action makes it one in the regulation of which the legislature of a state has wide powers. Whatever theory one may hold as to the nature of the corporate entity, it remains a wholly artificial creation whose internal relations between management and stockholders are dependent upon state law and may be subject to most complete and penetrating regulation, either by public authority or by some form of stockholder action.

We conclude that the state has plenary power over this type of litigation."

337 U.S. 541, 549-50 (1949)

Cohen went on to hold that the security for expenses statute created new substantive rights and liabilities, and that it had to be enforced by the federal courts in diversity actions, upon the authority of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). See also *York v. Guaranty Trust Company*, 326 U.S. 99 (1945).

Were the plaintiff here not attempting to sue on a federally-created right, *Cohen* would conclude the matter. However, the fact that the plaintiff is attempting to invoke the federal question jurisdiction of the Court does not *ipso facto* make the statute inapplicable, as the Seventh Circuit

held. In *Levitt v. Johnson*, CCH Fed. Sec. L. Rep. Par. 91,304 (D.C. Mass. 1963), Judge Wyzanski relied in part upon the reasoning of Mr. Justice Brandeis and Mr. Justice Douglas in holding that a Massachusetts statute regulating minority shareholders' derivative suits applied in an action under the Investment Companies Act (15 U.S.C. §80a-1, *et seq.*):

"Reference to the law of the state of incorporation to determine whether a stockholder has the substantive right to bring a derivative action for his corporation remains appropriate even if the claim which the corporation has against the alleged wrongdoer is based on a federal statute. It is this principle which explains the opinion of Justice Brandeis in *United Copper Co. v. Amal. Copper Co.*, 244 U.S. 261 that 'The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual stockholders the right to interfere with the internal management of the corporation.' That principle also explains Justice Douglas's opinion in *Price v. Gurney*, 324 U.S. 100, 107 that 'nowhere is there any indication that Congress bestowed on the bankruptcy court jurisdiction to determine that those who in fact do not have the authority to speak for the corporation as a matter of local law are entitled to be given such authority and therefore should be empowered to file a petition in behalf of the corporation.' "

The Seventh Circuit held that, because Count II of the complaint, in the court's judgment, stated a federal cause of action, the Wisconsin security for expenses statute (Section 180.405(4), Wisconsin Statutes) did not apply to it. (R. 234). In reaching this decision it relied upon *McClure v. Borne Chemical Company*, 292 F. 2d 824 (3d Cir. 1961), *cert. denied* 368 U.S. 939 (1962), and *Fielding*

v. *Allen*, 181 F. 2d 163 (2d Cir. 1950). *McClure* and *Fielding* both held that *Payne v. Hook*, 7 Wall. 425 (1869), foreclosed application of state security for expenses statutes in federal equity cases. This was error, because *Payne v. Hook* was overruled by *Mason v. United States*, 260 U.S. 545 (1922), to the extent it held that federal equity jurisdiction was not subject to limitation by state law. See 1A Moore's Federal Practice, §0.305(1), at p. 3051. *Mason* held that the Rules of Decision Act of 1789 applies to suits in equity as well as actions at law.

As amended in 1948, the Rules of Decision Act reads as follows:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

28 U.S.C. §1652 (1948)

The Rules of Decision Act gives statutory recognition to what has been termed the interstitial nature of federal law.

"Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation."

Hart and Wechsler, *The Federal Courts and the Federal System*, p. 435 (1953)

To remain consistent with the interstitial rationale noted by the commentators and the courts, and embodied in the Rules of Decision Act, the Court should recognize and enforce the state-created right unless to do so would unduly impair the pertinent federal policy:

"Federal policy should be effectuated by discriminate use of the [Rules of Decision] act, while in the absence of overriding federal policy effect should be given to state-created rights as such rights would be enforced in the state of origin."

Hill, "State Procedural Law in Federal Non-diversity Litigation", 69 Harv. L. Rev. 66, 113 (1955)

When a federal statute enters a field, it does not necessarily abrogate all other related law, or occupy the field; even where it does, there remains the problem of defining the limits of the field. Federal law should not displace any more state or common law than is necessary to effectuate federal policy.

"... the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy.

In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position . . ."

Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 350-52 (1939), Frankfurter, J.

McClure, *supra*, also erred in finding that there is an explicit policy in the Securities Exchange Act which cuts across state interests, and that recognition of state security for expenses legislation was inconsistent with the policy

of the Act and Federal Rule 23 (c). In *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), at page 556, Mr. Justice Jackson held that the New Jersey security for costs statute did not conflict with Rule 23 (c):

"[The provisions of Rule 23(c)] neither create nor exempt from liabilities, but require complete disclosure to the court and notice to the parties in interest. None conflict with the statute in question and all may be observed by a federal court, even if not applicable in state court."

It is equally clear that state security for expenses statutes do not conflict with the policy of the Securities Exchange Act. In fact, that Act expresses a positive policy in favor of security for expenses. Section 18(a) (15 U.S.C. §78r, see appendix A), creates a private action for damages in favor of any person who purchases or sells any security in reliance upon a false or misleading statement made in any application, report or document (apparently including proxy statements), at a price affected by such statement, and it expressly provides as follows:

"In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorney's fees against either party litigant."

² Similar security for expenses provisions exist in other statutes regulating securities. See e.g. Section 11(e) of the Securities Act (15 U.S.C. §77k(e)); Section 16(a) of the Public Utilities Holding Company Act (15 U.S.C. 79p(a)); and Section 323(a) of the Trust Indenture Act (15 U.S.C. §77www(a)).

Clearly, where the relief and the liability demanded are so much more drastic, as is true of the plaintiff's action, the policy expressed in Section 18(a) should apply *a fortiori*. Since the two relevant expressions of federal policy both strongly favor the policy of the Wisconsin security for expenses statute, the right created by the Wisconsin statute should not be abrogated by federal law.

CONCLUSION.

For the reasons stated, the Court should reverse the Court of Appeals and reinstate the order of the District Court, insofar as it dismissed Count II of the complaint.

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APPENDIX A

§ 78i. Manipulation of security prices (Section 9)

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business

of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the Commission

may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege with relation to such security.

(c) It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered on a national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d) The terms "put", "call", "straddle", "option", or "privilege" as used in this section shall not include any registered warrant, right, or convertible security.

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its

discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

(f) The provisions of this section shall not apply to an exempted security. June 6, 1934, c. 404, § 9, 48 Stat. 889.

§ 78j. Manipulative and deceptive devices (Section 10)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 10, 48 Stat. 891.

§ 78n. Proxies (Section 14)

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts a business in securities through the medium of any such member to give a proxy, consent, or authorization in respect of any security registered on a national securities exchange and carried for the account of a customer in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 14, 48 Stat. 895.

§ 78p. Directors, officers, and principal stockholders (Section 16)

(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar

month thereafter, if there has been any change in such ownership during such month, shall file with the exchange a statement (and a duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may

exempt as not comprehended within the purpose of this subsection.

(c) It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense.

(d) The provisions of this section shall not apply to foreign or domestic arbitrage transactions unless made in contravention of such rules and regulations as the Commission may adopt in order to carry out the purposes of this section. June 6, 1934, c. 404, § 16, 48 Stat. 896.

§ 78r. Liability for misleading statements (Section 18)

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false

or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued. June 6, 1934, c. 404, § 18, 48 Stat. 897; May 27, 1936, c. 462, § 5, 49 Stat. 1379.

§ 78s. Powers with respect to exchanges and securities (Section 19)

(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this chapter or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this chapter or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules

of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

(c) Omitted.

(d) The Commission is authorized and directed to make a study and investigation of the adequacy, for the protection of investors, of the rules of national security exchanges and national securities associations, including rules for the expulsion, suspension, or disciplining of a member for conduct inconsistent with just and equitable principles of trade. The Commission shall report to the Congress on or before April 3, 1963, the results of its study and investigation, together with its recommendations, including such recommendations for legislation as it deems advisable. The Commission is authorized to appoint,

without regard to the civil service laws, rules, and regulations, such personnel as the Commission deems advisable to carry out such study and investigation and to fix their respective rates of compensation without regard to the Classification Act of 1949, as amended, but no such rate shall exceed \$18,500 per annum. To carry out such study and investigation there is authorized to be appropriated the sum of \$950,000. June 6, 1934, c. 404, § 19, 48 Stat. 898; Sept. 5, 1961, Pub.L. 87-196, 75 Stat. 465; July 27, 1962, Pub.L. 87-561, 76 Stat. 247.

§ 78u. Investigations; injunctions and prosecution of offenses (Section 21)

(a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(b) For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memo-

randas, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

(d) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpoena of the Commis-

sion or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(f) Upon application of the Commission the district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction

of the United States, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any order of the Commission made in pursuance thereof or with any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title. June 6, 1934, c. 404, § 21, 48 Stat. 899; May 27, 1936, c. 462, § 7, 49 Stat. 1379; June 25, 1936, c. 804, 49 Stat. 1921; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§ 78aa. Jurisdiction of offenses and suits (Section 27)

The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherewher the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in

the Supreme Court or such other courts. June 6, 1934, c. 404, § 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921, June 25, 1948, c. 646, § 32(b) 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§ 78cc. Validity of contracts (Section 29)

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: *Provided*, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of

section 78b of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

(c) Nothing in this chapter shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to June 6, 1934, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this chapter or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this chapter or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien. June 6, 1934, c. 404, § 29, 48 Stat. 903; June 25, 1938, 677, § 3, 52 Stat. 1076.

§ 78ff. Penalties (Section 32)

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registra-

tion statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding \$500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports pursuant to an undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title shall forfeit to the United States the sum of \$100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78o of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact. June 6, 1934, c. 404; § 32, 48 Stat. 904; May 27, 1936, c. 462, § 9, 49 Stat. 1380; June 25, 1938, c. 677, § 4, 52 Stat. 1076.

APPENDIX B**REGULATION X-14
SOLICITATION OF PROXIES****DEFINITIONS****Rule X-14A-1**

Unless the context otherwise requires, all terms used in this regulation have the same meanings as in the Act or elsewhere in the General Rules and Regulations thereunder. In addition, the following definitions apply unless the context otherwise requires:

Associate. The term "associate" used to indicate a relationship with any person, means (1) any corporation or organization (other than the issuer or a majority owned subsidiary of the issuer) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, (2) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (3) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the issuer or any of its parents or subsidiaries.

Issuer. The term "issuer" means the issuer of the securities in respect of which a proxy is solicited.

Last fiscal year. The term "last fiscal year" of the issuer means the last fiscal year of the issuer ending prior to the date of the meeting for which proxies are to be solicited.

Proxy. The term "proxy" includes every proxy, consent or authorization within the meaning of Section 14(a) of the Act. The consent or authorization may take the form of failure to object or to dissent.

Proxy statement. The term "proxy statement" means the statement required by Rule X-14A-3 (a), whether or not contained in a single document.

Solicitation. The terms "solicit" and "solicitation" include—

- (1) any request for a proxy whether or not accompanied by or included in a form of proxy;
- (2) any request to execute or not to execute, or to revoke, a proxy; or
- (3) the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

The terms do not apply, however, to the furnishing of a form of proxy to a security holder upon the unsolicited request of such holder, the performance by the issuer of acts required by Rule X-14A-7, or the performance by any person of ministerial acts on behalf of a person soliciting a proxy.

SOLICITATIONS TO WHICH RULES APPLY

Rule X-14A-2

The rules contained in this regulation apply to every solicitation of a proxy with respect to securities listed and registered on a national securities exchange, whether or

not trading in such securities has been suspended, except the following:

(a) Any solicitation made otherwise than on behalf of the management of the issuer where the total number of persons solicited is not more than ten.

(b) Any solicitation by a person in respect of securities carried in his name or in the name of his nominee (otherwise than as voting trustee) or held in his custody, if such person—

(1) receives no commission or remuneration for such solicitation, directly or indirectly, other than reimbursement of reasonable expenses,

(2) furnishes promptly to the person solicited a copy of all soliciting material with respect to the same subject matter or meeting received from all persons who shall furnish copies thereof for such purpose and who shall, if requested, defray the reasonable expenses to be incurred in forwarding such material, and

(3) in addition, does no more than impartially instruct the person solicited to forward a proxy to the person, if any, to whom the person solicited desires to give a proxy, or impartially request from the person solicited instructions as to the authority to be conferred by the proxy and state that a proxy will be given if no instructions are received by a certain date.

(c) Any solicitation by a person in respect of securities of which he is the beneficial owner.

(d) Any solicitation involved in the offer or sale of a certificate of deposit or other security registered under the Securities Act of 1933.

(e) Any solicitation with respect to a plan of reorganization under Chapter X of the Bankruptcy Act, as amended, if made after the entry of an order approving such plan pursuant to Section 174 of said Act and after, or concurrently with, the transmittal of information concerning such plan as required by Section 175 of said Act.

(f) Any solicitation which is subject to Rule U-62 under the Public Utility Holding Company Act of 1935.

(g) Any solicitation through the medium of a newspaper advertisement which informs security holders of a source from which they may obtain copies of a proxy statement, form of proxy and any other soliciting material and does no more than (1) name the issuer, (2) state the reason for the advertisement, and (3) identify the proposal or proposals to be acted upon by security holders.

**INFORMATION TO BE FURNISHED SECURITY
HOLDERS**

Rule X-14A-3

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a written proxy statement containing the information specified in Schedule 14A.

(b) If the solicitation is made on behalf of the management of the issuer and relates to an annual meeting of security holders at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) shall be accompanied or preceded by an annual report to such security holders containing such financial statements for the last fiscal year as will, in the opinion of the management, adequately reflect the financial position and opera-

tions of the issuer. Such annual report, including financial statements, may be in any form deemed suitable by the management. This paragraph shall not apply, however, to solicitations made on behalf of the management before the financial statements are available if solicitation is being made at the time in opposition to the management and if the management's proxy statement includes an undertaking in bold-face type to furnish such annual report to all persons being solicited, at least twenty days before the date of the meeting.

(c) Four copies of each annual report sent to security holders pursuant to this rule shall be mailed to the Commission, solely for its information, not later than the date on which such report is first sent or given to security holders or the date on which preliminary copies of solicitation material are filed with the Commission pursuant to Rule X-14A-6 (a), whichever date is later. The annual report is not deemed to be "soliciting material" or to be "filed" with the Commission or otherwise subject to this regulation or to the liabilities of Section 18 of the Act, except to the extent that the issuer specifically requests that it be treated as a part of the proxy soliciting material or incorporates it in the proxy statement by reference.

REQUIREMENTS AS TO PROXY

Rule X-14A-4

(a) The form of proxy (1) shall indicate in bold face type whether or not the proxy is solicited on behalf of the management; (2) shall provide a specifically designated blank space for dating the proxy and (3) shall identify clearly and impartially each matter or group of related matters intended to be acted upon; whether proposed by the management or by security holders. No reference need be made, however, to proposals as to which discretionary authority is conferred pursuant to paragraph (c).

(b) Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by ballot a choice between approval or disapproval of each matter or group of related matters referred to therein as intended to be acted upon, other than elections to office. A proxy may confer discretionary authority with respect to matters as to which a choice is not so specified provided the form of proxy states in bold face type how it is intended to vote the shares represented by the proxy in each such case.

(c) A proxy may confer discretionary authority with respect to other matters which may come before the meeting, provided the persons on whose behalf the solicitation is made are not aware a reasonable time prior to the time the solicitation is made that any such other matters are to be presented for action at the meeting and provided further that a specific statement to that effect is made in the proxy statement or in the form of proxy. A proxy may also confer discretionary authority with respect to any proposal omitted from the proxy statement and form of proxy pursuant to paragraph (c) of Rule X-14A-8.

(d) No proxy shall confer authority (1) to vote for the election of any person to any office for which a bona fide nominee is not named in the proxy statement, or (2) to vote at any annual meeting other than the next annual meeting (or any adjournment thereof) to be held after the date on which the proxy statement and form of proxy are first sent or given to security holders.

(e) The proxy statement or form of proxy shall provide, subject to reasonable specified conditions, that the shares represented by the proxy will be voted and that where the person solicited specifies by means of a ballot provided pursuant to paragraph (b) a choice with respect to any matter to be acted upon, the shares will be voted in accordance with the specifications so made.

**PRESENTATION OF INFORMATION IN PROXY
STATEMENT****Rule X-14A-5**

(a) The information included in the proxy statement shall be clearly presented and the statements made shall be divided into groups according to subject matter and the various groups of statements shall be preceded by appropriate headings. The order of items and sub-items in the schedule need not be followed. Where practicable and appropriate, the information shall be presented in tabular form. All amounts shall be stated in figures. Information required by more than one applicable item need not be repeated. No statement need be made in response to any item or sub-item which is inapplicable.

(b) Any information required to be included in the proxy statement as to terms of securities or other subject matter which from a standpoint of practical necessity must be determined in the future may be stated in terms of present knowledge and intention. To the extent practicable, the authority to be conferred concerning each such matter shall be confined within limits reasonably related to the need for discretionary authority. Subject to the foregoing, information which is not known to the persons on whose behalf the solicitation is to be made and which it is not reasonably within the power of such persons to ascertain or procure may be omitted, if a brief statement of the circumstances rendering such information unavailable is made.

(c) There may be omitted from the proxy statement any information contained in any other proxy soliciting material which has been furnished to each person solicited in connection with the same meeting or subject matter if a clear reference is made to the particular document containing such information.

(d) All printed proxy statements shall be set in roman type as least as large as ten-point modern type except that to the extent necessary for convenient presentation financial statements and other statistical or tabular matter may be set in roman type at least as large as eight-point modern type. All type shall be leaded at least two points.

MATERIAL REQUIRED TO BE FILED

Rule X-14A-6

(a) Three preliminary copies of the proxy statement and form of proxy and any other soliciting material to be furnished to security holders concurrently therewith shall be filed with the Commission at least ten days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause therefor.

(b) Three preliminary copies of any additional soliciting material, relating to the same meeting or subject matter, furnished to security holders subsequent to the proxy statement shall be filed with the Commission at least two days (exclusive of Saturdays, Sundays or holidays) prior to the date copies of such material are first sent or given to security holders, or such shorter period prior to such date as the Commission may authorize upon a showing of good cause therefor.

(c) Four definitive copies of the proxy statement, form of proxy and all other soliciting material, in the form in which such material is furnished to security holders, shall be filed with, or mailed for filing to, the Commission not later than the date such material is first sent or given to any security holders. Three copies of such material shall at the same time be filed with or mailed for filing to each national securities exchange upon which any security of the issuer is listed and registered.

(d) If the solicitation is to be made in whole or in part by personal solicitation, three copies of all written instructions or other material which discusses or reviews, or comments upon the merits of, any matter to be acted upon and which is furnished to the individuals making the actual solicitation for their use directly or indirectly in connection with the solicitation shall be filed with the Commission by the person on whose behalf the solicitation is made at least five days prior to the date copies of such material are first sent or given to such individuals, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause therefor.

(e) All copies of material filed pursuant to paragraph (a) or (b) shall be clearly marked "Preliminary Copies" and shall be for the information of the Commission only, except that such material may be disclosed to any department or agency of the United States Government and the Commission may make such inquiries or investigation in regard to the material as may be necessary for an adequate review thereof by the Commission. All material filed pursuant to paragraph (a), (b) or (c) shall be accompanied by a statement of the date upon which copies thereof are intended to be, or have been, released to security holders. All material filed pursuant to paragraph (d) shall be accompanied by a statement of the date upon which copies thereof are intended to be released to the individuals who will make the actual solicitation.

(f) Copies of replies to inquiries from security holders requesting further information and copies of communications which do no more than request that forms of proxy theretofore solicited be signed and returned need not be filed pursuant to this rule.

(g) Notwithstanding the provisions of paragraphs (a) and (b) of this rule and of paragraph (e) of Rule X-14A-11, copies of soliciting material in the form of speeches, press releases and radio or television scripts may, but need not, be filed with the Commission prior to use or publication. Definitive copies, however, shall be filed with or mailed for filing to the Commission as required by paragraph (e) not later than the date such material is used or published. The provisions of paragraphs (a) and (b) of this rule and of paragraph (e) of Rule X-14A-11 shall apply, however, to any reprints or reproductions of all or any part of such material.

(h) Where any proxy statement, form of proxy or other material filed pursuant to this rule is amended or revised, two of the copies of such amended or revised material filed pursuant to this rule (or in the case of investment companies registered under the Investment Company Act of 1940, three of such copies) shall be marked to indicate clearly and precisely the changes effected therein. If the amendment or revision alters the text of the material the changes in such text shall be indicated by means of underlining or in some other appropriate manner.

Note: Where preliminary copies of material are filed with the Commission pursuant to this rule, the printing of definitive copies for distribution to security holders should be deferred until the comments of the Commission's staff have been received and considered.

MAILING COMMUNICATIONS FOR SECURITY HOLDERS Rule X-14A-7

If the management of the issuer has made or intends to make any solicitation subject to this regulation, the issuer shall perform such of the following acts as may be duly requested in writing with respect to the same subject mat-

ter or meeting by any security holder who is entitled to vote on such matter or to vote at such meeting and who shall defray the reasonable expenses to be incurred by the issuer in the performance of the act or acts requested.

(a) The issuer shall mail or otherwise furnish to such security holder the following information as promptly as practicable after the receipt of such request:

(1) A statement of the approximate number of holders of record of any class of securities, any of the holders of which have been or are to be solicited on behalf of the management, or any group of such holders which the security holder shall designate.

(2) If the management of the issuer has made or intends to make, through bankers, brokers or other persons any solicitation of the beneficial owners of securities of any class, a statement of the approximate number of such beneficial owners, or any group of such owners which the security holder shall designate.

(3) An estimate of the cost of mailing a specified proxy statement, form of proxy or other communication to such holders, including insofar as known or reasonably available, the estimated handling and mailing costs of the bankers, brokers or other persons specified in (2) above.

(b)(1) Copies of any proxy statement, form of proxy or other communication furnished by the security holder shall be mailed by the issuer to such of the holders of record specified in (a)(1) above as the security holder shall designate. The issuer shall also mail to each banker, broker, or other person specified in (a)(2) above a sufficient number of copies of such proxy statement, form of proxy or other communication as will enable the banker, broker,

or other person to furnish a copy thereof to each beneficial owner solicited or to be solicited through him.

(2) Any such material which is furnished by the security holder shall be mailed with reasonable promptness by the issuer after receipt of a tender of the material to be mailed, of envelopes or other containers therefor and of postage or payment for postage. The issuer need not, however, mail any such material which relates to any matter to be acted upon at an annual meeting of security holders prior to the earlier of (i) a day corresponding to the first date on which management proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, or (ii) the first day on which solicitation is made on behalf of management. With respect to any such material which relates to any matter to be acted upon by security holders otherwise than at an annual meeting, such material need not be mailed prior to the first day on which solicitation is made on behalf of management.

(3) Neither the management nor the issuer shall be responsible for such proxy statement, form of proxy or other communication.

(c) In lieu of performing the acts specified above, the issuer may, at its option, furnish promptly to such security holder a reasonably current list of the names and addresses of such of the holders of record specified in (a) (1) above as the security holder shall designate, and a list of the names and addresses of such of the bankers, brokers or other persons specified in (a) (2) above as the security holder shall designate together with a statement of the approximate number of beneficial owners solicited or to be solicited through each such banker, broker or other person and a schedule of the handling and mailing costs of each such banker, broker or other person, if such

schedule has been supplied to the management of the issuer. The foregoing information shall be furnished promptly upon the request of the security holder or at daily or other reasonable intervals as it becomes available to the management of the issuer.

PROPOSALS OF SECURITY HOLDERS

Rule X-14A-8

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer a reasonable time before the solicitation is made a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify the proposal in its form of proxy and provide means by which security holders can make the specification provided for by the Rule X-14A-4(b). A proposal so submitted with respect to an annual meeting more than 60 days in advance of a day corresponding to the first date on which management proxy soliciting material was released to security holders in connection with the last annual meeting of security holders shall prima facie be deemed to have been submitted a reasonable time before the solicitation. This rule shall not apply, however, to elections to office.

(b) If the management opposes the proposal, it shall also, at the request of the security holder, include in its proxy statement the name and address of the security holder and a statement of the security holder in not more than 100 words in support of the proposal. The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement.

(c) Notwithstanding the foregoing, the management may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) if the proposal as submitted is, under the laws of the issuer's domicile, not a proper subject for action by security holders; or

(2) if it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or

(3) if the management has at the security holder's request included a proposal in its proxy statement and form of proxy relating to either of the last two annual meetings of security holders or any special meeting held subsequent to the earlier of such two annual meetings and such security holder has failed without good cause to present the proposal, in person or by proxy, for action at the meeting; or

(4) if substantially the same proposal has previously been submitted to security holders, in the management's proxy statement and form a proxy relating to any annual or special meeting of security holders held within the preceding five calendar years, it may be omitted from the management's proxy material relating to any meeting of security holders held within the three calendar years after the latest such previous submission, provided that—

(i) if the proposal was submitted at only one meeting during such preceding period, it received

less than 3 percent of the total number of votes cast in regard thereto; or

(ii) if the proposal was submitted at only two meetings during such preceding period it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or

(iii) if the proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto.

(5) if the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.

(d) Whenever the management asserts that a proposal and any statement in support thereof may properly be omitted from its proxy statement and form of proxy, it shall file with the Commission, not later than 20 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to Rule X-14A-6(a), or such shorter period prior to such date as the Commission may permit, a copy of the proposal and any statement in support thereof as received from the security holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel. The management shall at the same time, if it has not already done so, notify the security holder submitting the proposal of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement

of the reasons why the management deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

FALSE OR MISLEADING STATEMENTS

Rule X-14A-9,

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Note: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

PROHIBITION OF CERTAIN SOLICITATIONS

Rule X-14A-10

No person making a solicitation which is subject to this regulation shall solicit—

- (a) any undated or post-dated proxy, or
- (b) any proxy which provides that it shall be deemed to be dated as of any date subsequent to the date on which it is signed by the security holder;

SPECIAL PROVISIONS APPLICABLE TO
ELECTION CONTESTS

Rule X-14A-11

(a) Solicitations to Which This Rule Applies.

This rule applies to any solicitation subject to this regulation by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders.

(b) Participant or Participant in a Solicitation.

For purposes of this rule the terms "participant" and "participant in a solicitation" include the following:

- (1) the issuer;
- (2) any director of the issuer, and any nominee for whose election as a director proxies are solicited;
- (3) any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more persons, directly or indirectly, takes the initiative in organizing, directing or financing any such committee or group;

(4) any person who finances or joins with another to finance the solicitation of proxies, except persons who contribute not more than \$500 and who are not otherwise participants;

(5) any person who lends money or furnishes credit or enters into any other arrangements, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the issuer by any participant or other persons, in support of or in opposition to a participant; except that such terms do not include a bank, broker or dealer who, in the ordinary course of business, lends money or executes orders for the purchase or sale of securities and who is not otherwise a participant;

(6) any other person who solicits proxies:

provided, however, that such terms do not include (i) any person of organization retained or employed by a participant to solicit security holders; or any person who merely transmits proxy soliciting material or performs ministerial or clerical duties; (ii) any person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or financial adviser, and whose activities are limited to the performance of his duties in the course of such employment; (iii) any person regularly employed as an officer or employee of the issuer or any of its subsidiaries who is not otherwise a participant; or (iv) any officer or director of, or any person regularly employed by, any other participant, if such officer, director, or employee is not otherwise a participant.

(c) *Filing of Information Required by Schedule 14B.*

(1) No solicitation subject to this rule shall be made by any person other than the management of an issuer.

unless at least five business days prior thereto, or such shorter period as the Commission may authorize upon a showing of good cause therefor, there has been filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant in such solicitation, a statement in duplicate containing the information specified by Schedule 14B.

(2) Within five business days after a solicitation subject to this rule is made by the management of an issuer, or such longer period as the Commission may authorize upon a showing of good cause therefor, there shall be filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant in such solicitation, other than the issuer, a statement in duplicate containing the information specified by Schedule 14B.

(3) If any solicitation on behalf of management or any other person has been made, or if proxy material is ready for distribution, prior to a solicitation subject to this rule in opposition thereto, a statement in duplicate containing the information specified in Schedule 14B shall be filed by or on behalf of each participant in such prior solicitation, other than the issuer, as soon as reasonably practicable after the commencement of the solicitation in opposition thereto, with the Commission and with each national securities exchange on which any security of the issuer is listed and registered.

(4) If, subsequent to the filing of the statements required by subparagraphs (1), (2), and (3) above, additional persons become participants in a solicitation subject to this rule, there shall be filed, with the Commission and each appropriate exchange, by or on

behalf of each such person a statement in duplicate containing the information specified by Schedule 14B, within three business days after such person becomes a participant, or such longer period as the Commission may authorize upon a showing of good cause therefor.

(5) If any material change occurs in the facts reported in any statement filed by or on behalf of any participant, an appropriate amendment to such statement shall be filed promptly with the Commission and each appropriate exchange.

(6) Each statement and amendment thereto filed pursuant to this paragraph (c) shall be part of the official public files of the Commission and for purposes of this regulation shall be deemed a communication subject to the provisions of Rule X-14A-9.

(d) Solicitations Prior to Furnishing Required Written Proxy Statement.

Notwithstanding the provisions of Rule X-14A-3(a), a solicitation subject to this rule may be made prior to furnishing security holders a written proxy statement containing the information specified in Schedule 14A with respect to such solicitation, provided that—

(1) The statements required by paragraph (c) of this rule are filed by or on behalf of each participant in such solicitation.

(2) No form of proxy is furnished to security holders prior to the time the written proxy statement required by Rule X-14A-3(a) is furnished to security holders: Provided, however, that this subparagraph (2) shall not apply where a proxy statement then meeting the requirements of Schedule 14A has been furnished to security holders.

(3) At least the information specified in Items 2(a) and 3(a) of the statement required by paragraph (c) to be filed by each participant, or an appropriate summary thereof, is included in each communication sent or given to security holders in connection with the solicitation.

(4) A written proxy statement containing the information specified in Schedule 14A with respect to a solicitation is sent or given security holders at the earliest practicable date.

(e) Solicitations Prior to Furnishing Required Written Proxy Statement—Filing Requirements.

Three copies of any soliciting material proposed to be sent or given to security holders prior to the furnishing of the written proxy statement required by Rule X-14A-3(a) shall be filed with the Commission in preliminary form, at least five business days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period as the Commission may authorize upon a showing of good cause therefor.

(f) Application of This Rule to Annual Report.

Notwithstanding the provisions of Rule X-14A-3(b) and (c), three copies of any portion of the annual report referred to in Rule X-14A-3(b) which comments upon or refers to any solicitation subject to this rule, or to any participant in any such solicitation, other than the solicitation by the management, shall be filed with the Commission, as proxy material subject to this regulation. Such portion of the annual report shall be filed with the Commission in preliminary form at least five business days prior to the date copies of the report are first sent or given to security holders.

(g) *Application of Rule X-14A-6.*

The provisions of paragraphs (c), (d), (e), (f) and (g) of Rule X-14A-6 shall apply, to the extent pertinent, to soliciting material subject to paragraphs (e) and (f) of this Rule X-14A-11.

(h) *Use of reprints or reproductions.*

In any solicitation subject to this rule, soliciting material which includes, in whole or part, any reprints or reproductions of any previously published material shall:

(1) State the name of the author and publication, the date of prior publication, and identify any person who is quoted without being named in the previously published material.

(2) Except in the case of a public official document or statement, state whether or not the consent of the author and publication has been obtained to the use of the previously published material as proxy soliciting material.

(3) If any participant using the previously published material, or anyone on his behalf, paid, directly or indirectly, for the preparation or prior publication of the previously published material, or has made or proposes to make any payments or give any other consideration in connection with the publication or republication of such material, state the circumstances.

APPENDIX C

WIS. STAT. 180.69

180.69. *Rights of dissenting shareholders on merger or consolidation.* (1) If a shareholder of a corporation which is a party to a merger or consolidation shall file with such corporation, at least 48 hours prior to the meeting of shareholders at which the plan of merger or consolidation is submitted to a vote, a written objection to such plan of merger or consolidation, and shall not vote in favor thereof, the new or surviving corporation shall, within 10 days after the effective date of such merger or consolidation, notify each such dissenting shareholder in writing that such merger or consolidation has become effective, by registered mail, return receipt requested, addressed to said shareholder at his last known address as appears upon the books of the corporation. If any such shareholder, within 20 days after the mailing of such notice, shall make written demand on the surviving or new corporation for payment of the fair value of his shares as of the date prior to the date on which the vote was taken approving the merger or consolidation, the surviving or new corporation shall pay to such shareholder, upon surrender of his certificate or certificates representing such shares, such fair value thereof. Such demand shall state the number and class of the shares owned by such dissenting shareholder. Any shareholder failing to make demand within such 20-day period shall be bound by the terms of the merger or consolidation, provided, however, that written notice of the effectiveness of such merger or consolidation shall have been given as herein provided.

(2) If within 30 days after the date on which such merger or consolidation was effected the value of such shares is agreed upon between the dissenting shareholder

and the surviving or new corporation, payment therefor shall be made within 90 days after the date on which such merger or consolidation was effected, upon the surrender of the certificate or certificates representing said shares. Upon payment of the agreed value the dissenting shareholder shall cease to have any interest in such shares or in the corporation.

(3) If within such period of 30 days or any extension thereof the shareholder and the surviving or new corporation do not so agree, then the dissenting shareholder may, within 60 days after the expiration of the 30-day period or extension thereof, file a petition in the circuit court of the county in which the registered office or principal place of business of the surviving or new corporation is located, asking for a finding and determination of the fair value of such shares, and shall be entitled to judgment against the surviving or new corporation for the amount of such fair value as of the day prior to the date on which such vote was taken approving such merger or consolidation, together with interest thereon at the rate of 5 per cent per annum to the date of such judgment. Costs shall be taxed as the court may deem equitable. If the surviving or new corporation is a foreign corporation without a registered office in this state, such petition shall be filed in the circuit court of the county where the registered office or principal place of business of the domestic corporation was last located, or if more than one such corporation is involved, then in the circuit court for the county where the registered office or principal place of business of any such corporation was last located. The judgment shall be payable only upon the surrender to the surviving or new corporation of the certificate or certificates representing said shares. Upon payment of the judgment, the dissent-

ing shareholder shall cease to have any interest in such shares, or in the surviving or new corporation. Unless the dissenting shareholder shall file such petition within the time herein limited, such shareholder and all persons claiming under him shall be bound by the terms of the merger or consolidation.

(3m) Any shareholder who for any reason desires to object to or dissent from any proposed plan under this section shall be limited to the rights and remedies provided by this section and such rights and remedies shall be exclusive of any other remedy or relief.

(4) A dissenting shareholder shall have no right to be paid the fair value of his shares as herein provided if the corporation shall prior to the effective date abandon the merger or consolidation. Written notice of such abandonment shall be given by the corporation to its shareholders within 30 days after such abandonment.

(5) Shares acquired by the surviving or new corporation pursuant to the payment of the agreed value thereof or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by such corporation as in the case of other treasury shares.

(6) The provisions of this section shall not apply to a merger if on the date of the filing of the articles of merger the surviving corporation, domestic or foreign, is the owner of all the outstanding shares of the other corporations, domestic or foreign, that are parties to the merger.

APPENDIX D

Price Range of J. I. Case Common Stock during each 3 month period beginning January 1, 1956 through December 31, 1959, as quoted in the Wall Street Journal.

1956	High	Low
January 1, through March 31, 1956	18½	14½
April 1 through June 30, 1956	15¾	11½
July 1 through September 30, 1956	15¼	11½
October 1 through December 31, 1956	15¾	12
1957		
January 1 through March 31, 1957	16¾	14
April 1 through June 30, 1957	18¾	14½
July 1 through September 30, 1957	18¼	15½
October 1 through December 31, 1957	16¾	12¾
1958		
January 1 through March 31, 1958	16¾	14¾
April 1 through June 30, 1958	20⅝	14¼
July 1 through September 30, 1958	23½	18½
October 1 through December 31, 1958	22¼	19½
1959		
January 1 through March 31, 1959	26⅝	20
April 1 through June 30, 1959	24½	21¾
July 1 through September 30, 1959	23¾	18
October 1 through December 31, 1959	23¼	18½

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SUPREME COURT, U. S.

No. 402

Office-Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

**J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN,
L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON,
WM. B. PETERS, and MARC B. ROJTMAN,**

Petitioners,

vs.

**CARL H. BORAK, for and on behalf of himself and all of the
other common stockholders of J. I. Case Company who are
similarly situated to him,**

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE PETITIONERS,

**Harry G. Barr, John T. Brown, L. R. Clausen, Wm. J. Grede,
E. P. Hamilton, Wm. B. Peters and Marc P. Rojtmán**

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**J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN,
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Petitioners,

vs.

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other common stockholders of J. I. Case Company who are
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On Writ of Certiorari to the United States Court of Appeals
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**BRIEF FOR THE PETITIONERS,
Harry G. Barr, John T. Brown, L. R. Clausen, Wm. J. Grede,
E. P. Hamilton, Wm. B. Peters and Marc P. Rojzman**

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Wisconsin, while not officially reported, is printed commencing at p. 200 of the printed Record. The opinion of the Court of Appeals for the Seventh Circuit is reported at 317 F.(2d) 838.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on May 29, 1963. The petition for a writ of certiorari was filed on August 26, 1963, and granted on November 12, 1963 U.S., 84 S.Ct. 195. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTES, RULES, AND REGULATIONS INVOLVED

The pertinent portions of the Securities Exchange Act, 15 U.S.C. §78a, *et seq.*, and Rules 14A-3 and 9, 17 CFR 240.14a-3 and 240.14a-9 are set forth in the Appendix to the Petition for a Writ of Certiorari at pp. 36-40.

QUESTIONS PRESENTED

Section 27 of the Securities Exchange Act of 1934 (hereinafter the "Act") provides that the United States District Courts "shall have exclusive jurisdiction of . . . all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."

The question presented is whether Count II of the Third Amended and Supplemental Complaint (hereinafter the "Complaint") charges facts which constitute a violation

of the Act entitling the plaintiff to maintain a private suit. If so, then is the nature of that suit such that the respondent in his private action may be entitled to retrospective relief by way of rescission or damages by reason of a corporate merger consummated seven years ago. If so, then is the substantive law fixing the liability for rescission or damages uniquely found in the federal Act or the law of Wisconsin. :

: Ultimately the individual petitioners herein ask whether a Wisconsin corporation and the directors thereof can be denied their statutory right to have a plaintiff stockholder post security for their expenses in defending an action (a) brought to enforce pre-emptive rights created by Wisconsin law which were extinguished in a merger effected through the alleged breach of the directors' fiduciary duties and by using a proxy statement alleged to fall short of the standard required by Sec. 14(a) of the Securities Exchange Act; and, (b) seeking to declare proxies void, the merger void, and damages for the violation of the Act?

4

STATEMENT

The corporate-petitioner has filed an extensive brief in this matter, printer's proof of which these individual petitioners have reviewed. The individual petitioners do, however, file this brief for the purpose of clarifying certain propositions which they deem of particular importance to them. The brief attempts to limit repetitive material except where necessary to provide continuity.

This case reaches this Court seven years after its commencement with a complaint which has been clipped, patched and pasted to evade the consistent direction of the trial court to post security for expenses pursuant to § 180.405, Wis. Stats., 1955, or be dismissed. All motions to repair this prolix complaint have been left undecided by the trial court as moot in view of its direction to post security.

While the allegations of the complaint must be regarded in a general manner in order to categorize respondent's claim, it must also be noted that no irrelevant material has been stricken from this prolix complaint; no answer has been made; no motion has been made to date to rule before trial pursuant to Federal Rule of Civil Procedure No. 12(d) on the affirmative defenses to be raised in the an-

swer¹; no proof of the allegations has been submitted; no defense and justification of this beneficial merger has been presented.

¹ For example, nowhere in thirty pages of allegations does respondent allege that any securities of J. I. Case Company are registered on a national exchange so as to make § 14(a) of the Act applicable. This alone is ground for dismissal. *Geismar v. Bond & Goodwin, Inc.*, 40 F.Supp. 876 (SDNY, 1941).

Serious questions as to the validity of extra-territorial service of process in 1958 upon Messrs. Elliott, Kraus, Ewing, Sturgis and Choate under the claim of 28 U.S.C. § 1655 being applicable to the Amended and Supplemental Complaint filed April 1, 1958.

ARGUMENT

Insofar as the individual petitioners are concerned, the basic question for determination is whether a stockholder, claiming to seek the avoidance of proxies, the avoidance of a consummated corporate merger, and damages (from unspecified parties for unspecified injuries) for an alleged violation of § 14(a) of the Act, is stating a unique federal cause of action to which the state security expense statute is inapplicable.

Wisconsin has a security for expense statute, §180.405(4), Wis. Stats., 1955, not unlike that considered and discussed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949). This substantial right to security applies to derivative actions brought in the right of the corporation. The Court of Appeals below on the authority of *McClure v. Borne Chemical Co.*, 292 F.(2d) 824 (CA 3, 1961), *cert. den.*, 368 U.S. 939, 82 S.Ct. 382 (1961), held that this substantial right will not be appended to a cause of action based on alleged violations of § 14(a) as such cause is uniquely created by federal law.

1. Does Count II of the Complaint State a Cause of Action to Enforce a Duty or Liability Created by the Act?

The startling anomaly in this case is that the Court of Appeals for the Seventh Circuit determined that because of mere allegations of violations of § 14(a) of the Act, this action is one brought to enforce a duty or liability created by the Securities Exchange Act.

Such determination belies the respondent's own declarations of record² and the pleading construed. Count II (Par. 2) recites by adoption:

"6. Under the common law of Wisconsin shareholders of Wisconsin corporations have preemptive rights . . .

"7. Plaintiff brings this action to enforce the preemptive rights . . ."

This is the basis of respondent's claim. The language is neither equivocal nor ambiguous, and refutes completely any suggestion that the gravamen of the action is to enforce a liability or duty created by the Act or the rules and regulations promulgated thereunder. Like the plaintiff in *Howard v. Furst*, 238 F.(2d) 790, 793 (CA 2, 1956), *cert.den.*, 353 U.S. 937, 77 S.Ct. 814 (1957):

"... (appellants) claim is for violation of state created rights, in no real or substantial sense dependent upon the provisions of the Securities Exchange Act of 1934 relative to proxy statements."

In view of respondent's representations to the trial court and the asseverations placed in his complaint, allegations as to violations of §14(a) of the Act are not basic, but are collateral to his case. Accordingly, the cause of action does not have either its source or its operative limits in the provisions of the federal statute. *Gully v. First National Bank of Meridian*, 299 U.S. 109, 57 S. Ct. 96 (1936).

² Permission to file the Third Amended and Supplemental Complaint was granted to respondent on his representation that he desired to file such complaint to seek relief only for violation of preemptive rights. (Unprinted Record, p. 593).

2. A Private Cause of Action for Rescission or Other Retrospective Relief is Not Created By Section 14(a) of the Act.

Federal causes of action under the Act have been created by implication in numerous cases where buyers and sellers of securities are involved. See, Anno., 37 ALR (2d) 649, 650-652. The cause of action has been created by implication under either of two theories: the tort liability theory of §286, Restatement of Torts; or the statutory construction theory. It has been pointed out that either rationalization requires an appraisal of manifest legislative intent. Ruder, *Civil Liability Under Rule 10b-5*, 57 Nw.L.R., 627, 631-635 (1963). No discoverable legislative intent conclusively justifies or refutes the creation of causes of action by implication under the Act. Note, *Implied Liability Under the Securities Exchange Act*, 61 Harv.L.Rev. 859 (1948).

Whatever justifications there might be for holding there is a federally created right of private action under §10(b) of the Act, they are not transferable to justify the creation of a right of private action under §14(a). See, *Brouk v. Managed Funds, Inc.*, 286 F.(2d) 90 (C.A. 8th, 1961), cert. granted, 366 U.S. 958, 81A S.Ct. 1921 (1961). In *Lapchak v. Barium Steel Corp., et al.*, Civil No. 91, 356 (S.D.N.Y., 1955), CCH Fed.Sec.L.Rep., Par. 90, 721, and *Howard v. Furst, supra*, the courts found upon irrefutably logical grounds that complaints involving alleged violations of § 14(a) of the Act did not state unique federal causes of action. Accordingly, state law was held applicable and determinative of the limits of the litigation. These holdings appear to be consistent with this Court's

observations in the recent decision of *S.E.C. v. Capital Gains Research Bureau*, U.S., 84 S.Ct. 275 (1963). There this Court was careful to note that although the federal securities acts included both general and specific proscriptions against nondisclosure, the essence of the law to be applied in such cases is the non-static, vital and ever-changing common law.

In *Dann v. Studebaker-Packard Corp.*, 288 F.(2d) 201 (CA 6, 1961), the plaintiff sought a finding that proxies solicited in violation of § 14(a) were void and for rescission of a consummated corporate contract. Unable to substantially distinguish *Howard*, the Court of Appeals for the Sixth Circuit found the action to be not derivative and claimed it would emphasize the right violated as opposed to the damage inflicted. By so doing, the Court was then able to say that the individual right was limited to declaratory judgment, and since the large area of retrospective relief (rescission) which the plaintiff sought was so obviously completely determinable and remediable under non-federally based common law, jurisdiction would be declined upon the basis of *Gully v. First National Bank*, *supra*.

The Court of Appeals below held that *Dann* was wrong and *Howard* was more wrong. It is respectfully submitted that neither are wrong. *Howard* holds that a derivative action alleging a violation of § 14(a) states only a common law action under applicable law. *Dann* holds that a non-derivative action claiming an alleged violation of § 14(a) entitles the plaintiff to only a vindication of federal rights; that if plaintiff seeks broad retrospective relief, this is available under state common law in a proper derivative action.

If it is said that the gravamen of Respondent's claim here is to void the merger, that claim does not rely on, nor is it founded in, federal law. Respondent must admit, as plaintiff did in *Lapchak, supra*, that a deficient proxy statement followed by a beneficial merger gives rise to no cause of action, but a lawful proxy statement followed by a fraudulent merger is actionable. In short, the violation of § 14(a) has no crucial bearing on the main thrust of the claim. Other than the purely academic question of whether expert proxy statement writers can follow the rules and regulations of the Commission, the only important question in a case of this kind is whether fraudulent acts so substantially taint the effectuation of the merger that it must be rescinded. This question is always answerable without reference to the caliber of the proxy statement. The corporation or a stockholder suing in its behalf derivatively in a proper action can attempt a rescission of the merger. But a rescission for fraud is a time-honored action at common law. References to violations of the Act are "mere excrescence or superfluity, tacked onto what are otherwise sufficient allegations of a claim for relief under . . . (Wisconsin) . . . law." *Howard v. Furst, supra*, at p. 794.

On the other hand, if respondent's main claim is to have the rights of full disclosure given him by federal law vindicated, he may be entitled to a declaratory judgment as to the validity of the proxies if this Court is willing to say that a proxy is a "contract made . . . the performance of which involves the violation of . . ." the Act or the rules and regulations thereunder. § 29(b), Act. Such an action would arise under the law of the United States and

pursuant to Federal Rule of Civil Procedure 54(c) relief could be given as in *Dann*.³

Admittedly such relief may be unappetizing and unrewarding. However, if a respondent seeks more, nothing but his own lack of temerity can hold him back. In order to recover damages or other retrospective relief which may provide a basis for an award of substantial attorneys' fees, respondent can face up to the magnitude of the mischief he creates, avow his claim to be derivative "in the right of his corporation," claim the corporation is entitled to rescind a contract or be reimbursed for alleged frauds of substance committed by the directors and officers, and post security for expenses if required by law. No defendant should escape the court's scrutiny of his actions by procedural hurdles, but by the same token no plaintiff such as the respondent here should be permitted to voluntarily and without the solicitation of others assume the role of guardian of thousands of stockholders⁴ and not be prepared to make whole his fellow stockholders if he is wrong and acting contrary to their expressed mandate. This, in the case *sub judice*, respondent is apparently unwilling to do.

³ We emphatically urge, however, that the merger between the two corporations cannot be voided under § 29(b) of the Act, because that contract of merger (R. 61-68) was neither made nor performed pursuant to any provision of the Act or any rule or regulation thereunder. That plan of merger was drawn up and adopted solely with reference to the laws of Wisconsin and New York. The only contact the merger had with the Act was purely collateral: the Act prescribes a methodology for absentee voting which is to be used if stockholders in sufficient numbers do not personally attend the meeting.

⁴ See, *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, p. 549; 1227.

3. The Petitioners Should Not Be Denied Their Statutory Right to Security for Expenses Under Count II of the Complaint.

Respondent, perhaps by design, perhaps by inadvertence, has pleaded a cause of action in Count II which purports to be for the vindication of preemptive rights created by Wisconsin law, for breach of fiduciary duties by the individual petitioners and for violations of the federal act by the corporation and some of its directors. Unless he is willing to plant his foot squarely on a theory and disclaim his intent to go to trial on others,⁵ all petitioners will be put to serious disadvantage at trial. By pleading in this multi-cause vein, any theory, including a derivative theory, can be pressed upon the trial court. Should the individual petitioners be vindicated, as they are confident they will be, they will have been put to great expense for which they have a right of indemnity against the corporation. §180.407, Wis. Stats., 1955. The corporate-petitioner on the other hand, may have little likelihood of recovering its full expense and indemnity without the reasonable security required by Wisconsin law.

CONCLUSION:

It is respectfully urged that the holding of the Court of Appeals for the Seventh Circuit that Count II of the Complaint sets forth a uniquely created federal cause of action to which the Wisconsin security for expenses statute is inapplicable, be reversed.

The gravamen of Count II of the Complaint is not uniquely based or dependent upon federal law, and retro-

⁵ See, *McClure v. Borne Chemical Co.*, *supra*, on use of disclaimers to avoid application of state security for expense statute.

spective relief may, upon proof of the allegations and equitable jurisdiction, be granted without reference to the alleged violations of § 14(a) of the Act.

No overriding public policy question appears to be involved in this case. The Securities & Exchange Commission has an arsenal of methods to police proxy solicitations including injunction to halt corporate action. Stockholders feeling aggrieved by corporate transactions have statutory appraisal remedies available under state law. Should a stockholder not desire to terminate his investment in the corporation after a transaction is consummated which he feels is illegal, he can bring a derivative action under the law of all states to recoup for the corporation what he believes to have been unlawfully given away and thereby make his investment whole.

For the foregoing reasons, it is respectfully urged that this Court reverse the judgment of the Court of Appeals for the Seventh Circuit insofar as the same reversed the District Court's dismissal of Count II of the Complaint for failure to comply with its prior order fixing security.

Respectfully submitted,

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MAR 4 1964

IN THE
Supreme Court of the United States IN F. DAVIS, CLERK

OCTOBER TERM, 1963:

No. 402

J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN, L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON, WM. B. PETERS, AND MARC B. ROJTMAN,

Petitioners,

vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PLAINTIFF-RESPONDENT.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963.

No. 402

J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN, L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON, WM. B. PETERS, AND MARC B. ROJTMAN,

Petitioners,

vs.

CARL H. BORAK, FOR AND ON BEHALF OF HIMSELF AND ALL OF THE OTHER COMMON STOCKHOLDERS OF J. I. CASE COMPANY WHO ARE SIMILARLY SITUATED TO HIM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF OF PLAINTIFF-RESPONDENT.

**STATUTES AND CONSTITUTIONAL PROVISIONS
INVOLVED.**

Other provisions of the Securities Exchange Act of 1934 and the United States Constitution are pertinent here. They are set forth in the Appendix to this brief.

QUESTION PRESENTED:

There is but a single question properly before this Court. The question stated in the petition (p. 2), joined in by J. I. Case Company ("Case") and the individual defendants, is as follows:

"Whether Sec. 27 of the Act grants a Federal cause of action for rescission or damages to a corporate stockholder in respect of a consummated merger which was authorized pursuant to the use of a proxy statement alleged to have contained misleading statements violative of § 14(a) of the [Securities Exchange] Act."

Without leave of Court, Case and the individual defendants have filed separate briefs. In each brief defendants inject a second issue contrary to the rules of this Court. This action has substantially extended this brief, and will make the oral argument more difficult for respondent and, we think, less satisfactory to the Court.

The Case brief (Case 2) states under "Questions Presented" as I the issue stated substantially as in the petition above but adds as II:

"Did the court below err in refusing to apply the Wisconsin security for expenses statute, even if such an action is held to lie?"

The individual defendants (Indiv. 2-3) add the question in different language.

Petitioners did not raise or discuss this second issue in their petition for certiorari (Pet. 8-13).

We believe that the effort to introduce the second issue is a clear violation of the rules of this Court, Rules 23(1)(c) and 40(1)(d).

This Court has routinely rejected similar efforts to add questions. The rule is clear and accordingly we limit citations. Thus, in *Local 1976, United Bro. of Carpenters v. N.L.R.B.*, 357 U. S. 93 (1958), the petition raised only questions relating to a hot cargo clause and § 8(b)(4)(A) of the National Labor Relations Act. This Court refused to consider contentions advanced in petitioners' briefs as to the capacity in which a given individual was acting and whether there was substantial evidence to support a Board determination. 357 U. S. at 96.

Mr. Justice Jackson put it strongly in *Irvine v. California*, 347 U. S. 128 at 129 (1954), saying:

"We disapprove the practice of smuggling additional questions into a case after we grant certiorari."

Defendants' departure from the rules poses a difficult tactical problem for respondent. We think that the Wisconsin security for expense statute has no part in the case but if the Court should reach it, our position should be stated. For the foregoing reasons, we have divided our brief into two parts. Part I contains argument germane to the case as we see it. Part II contains argument relating to the issue we think is not before the Court.

A final matter, the Court has set this case for argument on the summary docket, presumably because of the single, narrow issue. The enlarged scope of the case will force respondent to spend some time commenting upon what he considers an irrelevant issue. Thus less time will be available to deal with the question properly at bar and hence the Court will have less opportunity to explore the one issue before it.

For all of these reasons we ask the Court to disregard all portions of petitioners' and respondent's briefs relating to the applicability of the Wisconsin security for expenses statute (and particularly Case 26-33; Indiv. 12; Respondent, Part II).

4

STATEMENT.

Defendants fail to state the relevant facts, fail to relate accurately and completely the proceedings in the District Court, and set forth matters outside the record in an erroneous and misleading manner. Respondent-plaintiff ("plaintiff") will take up these points in order.

1. The Facts.

This appeal arises on a motion of defendant Case for security for expenses under a Wisconsin statute. The District Court held the statute applicable to count 1 and in part to count 2 of the Third Amended and Supplemental Complaint (the "complaint"). The District Court and

1. As above stated without leave of Court, the defendants who joined in a single petition for certiorari have filed two briefs—one by the corporation, the other by the individual defendants. The Court should know that from the inception of this action until after the decision of the Court of Appeals, both the Company and the individual defendant directors were represented by the same counsel. The defendants Rojzman and Elliott were represented by separate counsel. The positions taken in the courts below by the corporation and all of the individual defendants were identical and only one brief was filed for all defendants in these courts. Not until review was sought in this Court did Case retain independent counsel, and only within the past month claim its interests were in conflict with the individual defendants. The letter from counsel for Case dated February 11, 1964 to the Clerk of the Court requesting separate oral argument provides: " * * * counsel for the Case Company state that an integral part of the Company's argument is the contention that if the complaint states a federal cause of action, the action it states is derivative. If the Court accepts this contention, and the allegations of the complaint should be proved, the individual defendants might be liable to the Case Company. It follows that the interests of the Case Company and the interests of the individual defendants differ substantially and that permission should be granted for the Case Company and the individual defendants to be heard by separate counsel."

the Court of Appeals accepted as the facts the allegations of the complaint. Similarly, on review in this Court, the facts are those set forth in the complaint (R. 179-198).

The District Court summarized the complaint and with "slight embellishment" the Court of Appeals adopted the summary. The summary appears at 317 F. 2d 842-~~4~~ 846 and R. 222-225, 228-229. For the convenience of the Court the summary is set forth here.

"Count 1 of the complaint alleges that plaintiff, the owner of 2,000 shares of Case common stock acquired prior to the merger complained of, sues in a representative capacity on behalf of himself and all other common stockholders prior to the merger except those participating in or cognizant of the wrongdoing alleged. In addition to Case, he joins as defendants certain of its directors and former directors, some of whom are also officers and former officers, and the executor of the estate of a deceased director. Defendants who are now directors of Case are sued individually and as directors, the defendant Rojzman is sued individually and as representative of American Tractor Corporation shareholders receiving Case stock as the result of the merger between Case and American Tractor Corporation, and the defendant Beeber is also sued, individually and as representative of holders of certain purchase warrants. In Count 1, the plaintiff alleges substantially as follows: In October 1956, Case formally announced to its shareholders a proposed plan of merger between Case and American Tractor Corporation and proposed stock option amendments, which were purportedly approved by Case shareholders on November 15, 1956. The merger was purportedly consummated on January 10, 1957. Both the merger and stock option plan were effectuated by illegal and fraudulent acts and illegally deprived the plaintiff and other shareholders similarly situated of their preemptive right—rights which the plaintiff here seeks to

enforce. Under the merger and plan, 648,852 shares of common stock and 1,197,704 shares of second preferred stock were set aside or issued without granting the plaintiff's class their pre-emptive rights to subscribe thereto.

"The plaintiff then describes in some detail the acts which he believes to have resulted in a violation of the pre-emptive rights of Case shareholders as follows: In 1954, Elliott's company and a syndicate headed by him acquired 170,000 shares of American Tractor Corporation stock. Elliott violated the Securities Act of 1933 and regulations thereunder in connection with that stock and the sale of a portion thereof. Thereafter, the market price of American Tractor Corporation stock; most of which was held by Elliott, Rojzman and their associates, began an unreasonable rise, due to illegal manipulations, which manipulations Elliott was aware of prior to the merger. Rojzman, Brown, Grede and the Case management also knew prior to the merger that the market price of ATC stock was achieved illegally and artificially. Since the merger one person has been found guilty in another district court of manipulating ATC stock from May, 1955 to February, 1956; and Gilligan, Will and Company, formerly defendant in this cause and the specialist in ATC stock on the American Stock Exchange was found by the Securities and Exchange Commission to have engaged in improper and illegal activities while specialist with respect to ATC stock.

"Case directors violated Wisconsin law and breached their fiduciary duties to the shareholders in approving the merger by including future earnings of American Tractor Corporation and future services of its officials as partial consideration for issuance of Case stock, by agreeing to issue Case stock at less than par value, by failing to evaluate properly the American Tractor Corporation assets acquired and paying an excessive price for American

Tractor Corporation, by over-valuing American Tractor Corporation's and undervaluing Case's earnings and book value resulting in a fraud on Case shareholders, by relying on market price of American Tractor Corporation stock as a measure of American Tractor Corporation's value, by relying on American Tractor Corporation's own appraisal of its physical assets and failing to examine that appraisal, by considering future earnings as an element of value and by failing to recognize the necessity of future investments as part of the cost of the merger.

"Case directors breached their fiduciary duties by approving and issuing a letter and proxy statement of October 15, 1956, prior to the meeting at which the merger was approved which contained numerous material omissions and false and misleading statements relied upon by Case shareholders in approving the merger and without which the merger would not have been approved. Three pages of the complaint are given over to instances thereof.

"For example, it is alleged that defendants failed to disclose that the total purchase price of ATC exceeded \$17,000,000, that the book value of Case common stock was \$36.00 and ATC's only \$1.15, that persons who negotiated the merger were recipients of stock options; and that one of the director defendants, as a supplier, would receive a substantial increase in business as a result of the merger, the merger was fair because in accordance with the comparative market prices of the two stocks, and the Case common shareholders would not be adversely affected when in fact their proportionate interest in the earnings, book value and voting power were seriously diluted.

"Both the Case and American Tractor Corporation management groups were guilty of self dealing in connection with the plan and merger.

"The conduct of the defendants, the plaintiff claims, con-

stitutes actual or constructive fraud on himself and other shareholders similarly situated depriving them of their pre-emptive rights. He claims that if they had been permitted to purchase stock issued in the merger on the same basis as American Tractor Corporation shareholders, they could have obtained one-fourth share of common stock and one-half share of second preferred stock for \$2.20 for each share of Case common stock held by them at the time of the merger.

"In Paragraph 19 of Count 1 of his complaint, the plaintiff alleges facts occurring after the merger particularly, that Brown, Grede, Rojzman and other principal defendants were no longer with Case and that Case was nearly bankrupt; in Paragraph 20 he alleges that the class he represents has been irreparably damaged by failure to recognize pre-emptive rights, and in his prayer for relief he asks that the court enter judgment in favor of the class he represents and against Case directors who approved the merger and all defendants the court finds responsible for the merger and the consequent deprivation of pre-emptive rights in an amount to be determined and/or that the court enter a decree directing Case to issue to the class he represents such securities of Case as the court deems necessary to compensate the class for violation of pre-emptive rights, and asks for such other relief as equity shall require.

• • •

"As the jurisdiction basis for count 2, plaintiff asserted diversity of citizenship between the parties, Section 27 of the Securities Exchange Act and Sections 1331 and 1337 of the Judicial Code. 28 U. S. C. A. 1331, 1337.

"By reference, plaintiff realleged substantially all of the charging paragraphs contained in count 1 of the complaint. He alleged that the merger between Case and ATC was

consummated early in 1957, following its approval by a vote of two-thirds of the outstanding common and preferred shares of Case at a special stockholders meeting held for that purpose. The count alleged that the proxy solicitation material issued by the defendants prior to that special meeting was false and misleading and its use constituted a violation of Section 14(a) of the Act and the SEC Rules promulgated thereunder. 17 CFR 240.14a-3, 140.14a-9. The theory of the cause of action stated in that count was the contention that the Case-ATC merger and stock option agreements approved by the vote of proxies given by shareholders of Case in response to allegedly unlawful proxy solicitation material were void agreements under the provisions of Section 29(b) of the Act. 15 U. S. C. A. 78cc(b). Plaintiffs sought relief declaring that the proxy solicitation material was false and misleading, that the proxies solicited thereby were illegal and void, and that the merger and all agreements entered into pursuant thereto were void. He also prayed damages for injuries sustained by himself and all other stockholders similarly situated which grew out of violation of the Act, and such other and further relief as equity might require."

1. Defendants not only ignore these facts but go beyond the record to make statements of a misleading character. For brevity, we refer to only three of such statements:

(1) Defendants state that the merger has proven "beneficial" (Indiv. 5). The statement is in direct contradiction to the record which shows the merger has proven disastrous. The complaint states: (a) at the time of the merger ATC "was scarcely a viable entity"; (b) that in 1958, as a result of the merger, Case had to issue debentures of \$25,000,000; (c) that in 1960 and 1961 Case obtained short term bank loan extensions of \$178,000,000 and \$162,000,000 (and for 1 and 3 years) respectively, and that but for the extensions, Case would be in bankruptcy, receivership or reorganization; (d) that in the year ending October 31, 1960, Case had a net loss of \$39,814,793 and that in the first 9 months of fiscal 1961 Case had a net loss of \$7,121,308, which losses exceeded the accumulated earnings of \$42,932,616 at the time of the merger; (e) as a result of these losses Case stopped dividend payments on its first preferred stock in 1961, dividends which

2. History of Litigation.

Defendants have sought, for over seven years of litigation, to delay trial and to avoid it altogether if possible.

Defendants give an incomplete history of the proceedings below which leaves the unwarranted impression that the long delays are due primarily, if not solely, to plaintiff's filing of amended complaints to avoid application of the Wisconsin statute (Case 6; Indiv. 4). Although the history is not directly relevant, it does place the issues in perspective. It ought to be set forth accurately. The chief steps were as follows:

(1) *The complaint—attempts at injunctive relief—*

had been paid continuously since 1935; and (f) in 1961 Case abandoned production of crawler tractors at the plant in Churubusco, Indiana, the only plant facility acquired from ATC (R. 189, 195). The record also shows that by 1960 and 1961 the individual defendants in management had "resigned" (R. 194-195) and the Company has made clear it does not want to be associated with its co-defendants (Case 9).

(2) Apparently to support the position that the merger was beneficial, defendants state that no other stockholder has joined with the plaintiff or challenged the legality of the merger in any other proceeding (Case 5). This statement is untrue. In 1957, defendants procured dismissal of an action brought against them by other shareholders in relation to the merger in New York on the ground of *forum non conveniens*. *Novich, et al. v. Rojzman, et al.*, 5 Misc. 2d 1029, 161 N. Y. S. 2d 817 (1957).

(3) Defendants quote the market price of Case common stock on the New York Stock Exchange for a period of three years following the merger when the price "rose steadily" (Case 24, App. D. p. 43). This statement is outside the record and misleading. Since defendants have presented part of the story, the Court should have the whole story of stock market prices. Subsequent to 1959 the market price plummeted:

	Low*	High
1960	7½	22½
1961	6¾	13¼
1962	4½	9½

Beginning in the latter part of 1962 with a complete change of management and almost a complete new board of directors, Case began to make a profit and stock market prices reflected this change.

* Source: Standard & Poor's stock guide.

early efforts of defendants to avoid merits—discovery by plaintiff (November 1956 to March 1958). On November 13, 1956, plaintiff, holder of 2,000 common shares of Case, filed a representative (non-derivative) complaint to declare void and to enjoin the merger between Case and ATC (R. 15, 16). He alleged, *inter alia*, that the proxy statement was false and misleading (R. 6-8, 15)!

On November 15, 1956, the District Court denied a motion for a temporary injunction (R. 86). On that day the stockholders approved the merger by a "close margin" (R. 192) of only 3.70% votes more than the minimum required.²

On November 26, 1956 defendants answered, denying that the "Proxy Statement * * * is untrue or misleading" (R. 79, 81). They raised no affirmative legal defenses. At the same time defendants sought an immediate trial and an order precluding all pre-trial discovery (R. 82-85). Plaintiff opposed the motion but urged early trial (R. 92-3). Defendants agreed to produce some documents (Unprinted R. 134-6) but since December, 1956 have sought to frustrate discovery (see, e.g., Unprinted R. 134-6, 147-154, 176, 206-209, 231-237, 295-7, 315-19).

In addition, defendants by a series of motions sought to

1. Defendants conceded in the Court of Appeals that the original complaint was not derivative and not subject to the Wisconsin statute (Def. Br. Ct. App. 24). Had defendants made this concession at any time in the District Court, we think that court also would have held the subsequent complaints to be non-derivative.

2. Shareholder approval of the merger by 66 2/3% of the outstanding shares was required. The plan achieved only 1,592,474 votes out of 2,262,766 shares outstanding or a favorable vote of 70.37%. Defendant's statement (Case 6) that of the common shares voting at the stockholders' meeting, 91.8% voted in favor of the merger is misleading. The test is not the percentage of those voting, but of shares outstanding. Moreover, this statement tends to create the erroneous impression that the outcome of the vote would have been the same even if the proxy statement had not been misleading (R. 106).

avoid trial completely. These included motions (1) for summary judgment, denied March 6, 1957 (Unprinted R. 142, 174); (2) to dismiss, filed April 22, 1957 and withdrawn May 13, 1957 (Unprinted R. 190, 241); (3) to dismiss and for judgment on the pleadings, filed September 20, 1957 and ordered deferred until plaintiff completed discovery and filed his amended complaint (Unprinted R. 264, 288).

During the course of defendants' obstructionist tactics and from December 1956 until March 1958, plaintiff's counsel spent more than 3100 hours in discovery and trial preparation; made three extended trips to New York City, Washington, D. C. and innumerable trips to Milwaukee; examined 34 deponents whose testimony exceeds 3,700 pages and examined thousands of pages of documents; all at considerable expense to plaintiff (Unprinted R. 541-4).

(2) *Amended complaint—first motion for security—(April 1958-July 1960).*

On April 1, 1958 plaintiff filed his amended complaint (R. 111). Although the amended complaint did not differ materially from the original complaint, defendants, on April 7, 1958, a year and a half after the institution of the action, for the first time moved for security under the Wisconsin security for expense statute, requesting security of \$1,000,000 (Unprinted R. 373).

The District Court on October 23, 1958 ordered plaintiff to post security of \$75,000 but granted leave to amend (R. 151).

Plaintiff's motion for rehearing, filed December 2, 1958, was denied and the action was dismissed for failure to post security on September 17, 1959 (R. 157). On March 10, 1960, however, the court vacated its dismissal and granted leave to plaintiff to file a second amended and supplemental complaint (R. 158). Defendants appealed from the order

allowing the amended complaint, but the appeal was dismissed by the Court of Appeals on April 21, 1960, for want of jurisdiction (Unprinted R. 619).

(3) *Second amended complaint—second motion for security. (July 1960-January 1962).*

Case renewed its motion for security on July 19, 1960 (Unprinted R. 647),¹ and on January 2, 1962 the District Court ordered plaintiff to file another complaint separating his "cause of action" based on diversity of citizenship from his "cause of action" arising under the Act (Unprinted R. 671-2).

(4) *Third amended complaint—third motion for security (January 1962-October 1962).*

Accordingly, on January 12, 1962 plaintiff filed his third amended and supplemental complaint. Case renewed its motion for security on January 26, 1962 (R. 198) and on September 4, 1962 the District Court made its ruling.

1. Defendants' irrelevant assertion (Case 7) that they were not put on notice of plaintiff's claim under § 14(a) until July, 1960 (Case 7) is not well founded. As they recognize (Case 5), the original complaint alleged the proxy statement was false and misleading and asked the court to declare that the merger was void (R. 15-16). Indeed, the answer denied that the proxy statement was misleading (R. 79, 81).

Defendants filed also a series of motions again obviously designed to delay or avoid trial including motions to quash service or process (Unprinted R. 663, 665, 668) and plainly inconsistent motions to dismiss because the complaint allegedly did not state "a short and plain" claim under Rule 8, F.R.C.P. and in the alternative for a more definite statement of the claim (Unprinted R. 652). Individual defendants suggest also they will raise certain affirmative defenses such as failure of the complaint to allege that securities of Case are registered on a national exchange (Indiv. 5, note 1). In grasping for straws, defendants overlook that the proxy statement, incorporated in the complaint by reference (R. 182), states that Case securities are listed on the New York Stock Exchange (R. 24, 27, 42). They overlook also the Company's brief which states that Case stock was listed on the New York Stock Exchange (Case 4).

3. The Rulings Below.

The District Court held (R. 200) that count 1 stated a derivative action as to which the Wisconsin statute was applicable (R. 208). As to count 2, the court, following *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201 (C. A. 6, 1961), held that federal jurisdiction under § 14(a) of the Act ended with the grant of declaratory relief (R. 211). The District Court recognized that here, unlike *Dann*, there was diversity and hence power to grant plenary relief. The court concluded, however, that such relief could be granted only under state law and hence the Wisconsin statute applied in part to count 2 (R. 212). The court therefore ordered plaintiff to post security of \$75,000 with leave to file an amended complaint alleging only the § 14(a) cause of action for a declaratory judgment that the proxies were invalid and the merger void (R. 213). The District Court made the certificate required by § 1292(b) of the Judicial Code and the Court of Appeals granted leave to appeal (R. 215, 216).

The Court of Appeals reversed the district court. It held that count 1 stated a claim on behalf of stockholders individually and that the Wisconsin statute was therefore inapplicable (317 F. 2d at 845; R. 227). With respect to count 2, the court held that under §§ 14(a) and 27 of the Act federal courts are clothed with power broad enough to effectively protect "the right of shareholders to a full and fair disclosure of all material facts which affect corporate elections by proxy" including, "damages or such other retrospective relief . . . as the merits of the controversy may require" (317 F. 2d at 848, 849; R. 233, 234). The court held also that the Wisconsin statute is inapplicable to count 2 (317 F. 2d at 849; R. 234).¹

1. The Court of Appeals agreed with the district court that § 10(b) of the Act was inapposite here (317 F. 2d at 846; R. 229). That issue is not before this Court.

Defendants have not sought review of the Court of Appeals decision that count 1 is not derivative, and that the Wisconsin statute is inapplicable to it. Review is limited solely to count 2 (Case 33; Indiv. 13).

SUMMARY OF ARGUMENT

For over seven years the defendants have successfully resisted trial on the merits. The motion for security for expenses which gave rise to the order of the District Court, reversed by the Court of Appeals, was designed to discourage the plaintiff altogether. In essence, the complaint charges a deprivation of preemptive rights of plaintiff and other shareholders, the result of a merger approved by means of a false and misleading proxy statement, and in consequence of illegal and fraudulent conduct on the part of directors and others. Count 1, based on diversity jurisdiction, claims breach of the directors' fiduciary duty to the shareholders. The Court of Appeals held the Wisconsin Security for Expenses statute inapplicable to this count, and no review is sought in this Court of that holding. Review in this case is limited to count 2. This count, based on diversity and federal question jurisdiction, claims that shareholders' rights were violated by the approval of the merger through a false and misleading proxy statement, which contravened § 14(a) of the Securities Exchange Act of 1934 (the "Act").

The sole issue before this Court is the scope of relief which a federal court has jurisdiction to grant in a private cause of action brought under §§ 14(a), 27 and 29(b) of the Act. The Court of Appeals held that the District Court has jurisdiction to award damages or such other retrospective relief as the merits of the controversy may require.

The Court of Appeals decision is correct and consistent with a long line of authority. The existence of a private right of action has been recognized by every circuit which

has considered the question. With the exception of *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201 (C. A. 6, 1961), the right of the plaintiff to appropriate relief has never been questioned. A private right of action for violation of proxy rules with jurisdiction and discretion to grant full relief is required both by the purpose and design of the Act. It is necessary to give shareholders the full measure of protection which Congress provided for them. Their losses can be recovered most effectively through a private action in which the violators will be required to make the victims whole. Such a private action is consistent with a statute designed to eliminate false and misleading proxy statements and which envisages "reasonably complete and effective" regulation (Act, § 2).

The District Court held there was a private cause of action for violation of § 14(a) of the Act but that the sole relief it had jurisdiction to grant was to enter a declaratory judgment that the proxy statement and merger and all agreements made pursuant thereto were void, and that the plaintiff would thereafter have to secure enforcement of the judgment in the state courts.

All the defendants here concede there is a private cause of action under § 14(a) but disagree as to the scope of relief. Defendant Case claims that jurisdiction extends only to the entry of an injunction (Case 10). The individual defendants go further and concede the court may enter a declaratory judgment as to the validity of the proxies (Indiv. 10).

In addition to attacking the decision of the Court of Appeals, defendants also attack the order of the District Court which they here seek to have reinstated, by the claim that a declaratory judgment cannot be entered as to the legality of the merger agreement. Defendants have offered no sound reasons for disturbing the Court of Appeals de-

cision. They concede the correctness of the cases granting full relief under § 10(b) of the Act but make no effort to show why a different rule should apply to § 14(a) cases. Despite their concession and the District Court ruling that a cause of action will lie under § 14(a) for some relief, they rely inconsistently on cases under other statutes holding that a private cause of action will not lie for any relief. For the same reason their argument on the *expressio unius* maxim is illogical. It also has been rejected specifically as to the issue before the Court by lower federal courts and by implication in this Court. The split or piecemeal litigation device suggested by the *Dann* case, relied on by the District Court and the defendants has been the subject of widespread criticism. It would defeat the purposes of the Act and make a mockery of the federal judicial process.

The question of the applicability of the Wisconsin Security for Expenses statute was not raised or discussed in the petition for certiorari and is not properly before this Court. The argument on this question should be disregarded. If the Court should consider the issue, our position on the merits is summarized as follows:

1. The Wisconsin Security for Expenses statute applies only to actions brought in the right of the corporation. This action is brought on behalf of shareholders in their own right. Even if count 2 stated a derivative claim, the claim arises from and is bottomed on federal law, and every court considering the question has accordingly held security for expenses statutes inapplicable.

2. The Wisconsin Security for Expenses statute, if applicable, violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. The Wisconsin Security for Expenses statute is significantly different from the New Jersey security

for expenses statute which has previously been upheld by this Court. Under the Wisconsin statute, the plaintiff must be the holder of 3% of the common stock of Case or own 67,883 shares valued at \$1,358,000 in order to maintain a derivative suit without posting security. Under the New Jersey statute, shareholders are exempt if they own 5% of the stock or stock having a market value of \$50,000. The Wisconsin statute arbitrarily and unreasonably closes the courts to derivative suits brought by shareholders of publicly held Wisconsin corporations generally and Case particularly, regardless of whether the action is well founded or the shareholder has a substantial financial interest in the corporation.

Even though there may be common law state remedies, their ineffectiveness or inadequacy in practice support the recognition of an effective private cause of action for false and misleading proxy statements.

Fifth. The absence of any formal administrative procedure under the Act requires the recognition of a private right of action. Many practical considerations may dictate policy on the part of the Commission to initiate judicial action having no significance to the merits of the matter. Lack of information, limitations of time, manpower and resources are among such considerations. The inaction by the Commission should not in these circumstances bar an action to secure compliance with the proxy rules by interested and affected shareholders.

Sixth. A civil remedy may clearly be implied from section 29(b) providing that every contract made in violation of the Act or whose performance would involve a violation is void. Support for this position is found in the 1938 amendment to the Act, providing that certain contracts should not be deemed void in any action maintained in reliance upon this subsection (48 Stat. 903 (1934) as amended, 52 Stat. 1076 (1938), 15 U.S.C. 78 cc (b) (1958)). In *Goldstein v. Groesbeck supra*, 142 F. 2d 422, the late Judge Charles Clark analogized the provision of section 26(b) of the Public Utility Holding Act (15 U.S.C.A. § 79z(b)), to section 29 of the 1934 Act.

He said (*Ibid* at 426-7):

" * * * § 26 is incomplete, if not ineffective, unless it is considered to authorize recovery by the operating companies. The rule of damages—whether return of the full consideration, as plaintiff claims, or only the difference between the consideration and the value of the services received—need not be settled now in advance of answer and of trial on the merits. A useful analogy in favor of this interpretation can be found

in § 29 of the Securities Exchange Act of 1934, 15 U. S. C. A. § 78ec, which is virtually identical with § 26 of the Utility Act, for it is now clear from the 1938 amendment to § 29, 52 Stat. 1076, that Congress intended a right of recovery thereunder. *Grismar v. Bond & Goodwin, Inc.*, D.C.S.D.N.Y., 40 F. Supp. 876.

Seventh. Section 27 of the Act does not distinguish between actions brought by the Commission and actions brought by private persons.

"Once a private plaintiff is properly in court under the proxy rules there is no reason to suppose that the quantum of relief which a court of equity may grant is any different from what it would if the Commission were the plaintiff." *Loss, Securities Regulation* (2d Ed. 1961), p. 956.

In actions where the Commission was plaintiff, courts have appointed receivers under the 1934 Act, even though such relief is not provided for expressly since a court of equity has inherent power to provide complete relief in the light of statutory purposes.

The foregoing considerations have been articulated and relied upon by the solid array of authority referred to by the Court of Appeals below. We turn now to defendants' briefs.

5. The briefs of defendants are of interest more for what is conceded and by their significant silences than for what is expressly asserted. As noted, all defendants concede the existence of a private cause of action under section 27 for violations of section 14(a). (Case-10; Indiv. 9). There is no discussion and in fact no effort to deal with

1. *S. E. C. v. Los Angeles Trust Deed & M. Exchange*, 186 F. Supp. 830 (S. D. Cal.), *modified and affirmed*, 285 F. 2d 162 (C. A. 9, 1960), *cert. denied* 366 U. S. 919 (1961); *S. E. C. v. H. S. Simmons & Co., Inc.*, 190 F. Supp. 432 (S. D. N. Y. 1961). See also *Aldred Investment Trust v. S. E. C.*, 151 F. 2d 254 (C. A. 1, 1945), *cert. denied*, 326 U. S. 795 (1946) (Granted receivership under Investment Company Act of 1940, relief not specified in the statute).

ARGUMENT.

I.

THE COURT OF APPEALS CORRECTLY HELD THAT THERE IS JURISDICTION UNDER SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934 TO GRANT DAMAGES OR OTHER RETROSPECTIVE RELIEF IN A SHAREHOLDER'S SUIT FOR VIOLATION OF SECTION 14(a) THEREOF.

1. The sole issue before this Court is the scope of relief a federal court has jurisdiction to grant in a private cause of action brought under sections 14(a), 27, and 29(b) of the Securities Exchange Act of 1934 (the "Act"). The Court of Appeals held that the District Court has jurisdiction "to award damages or such other retrospective relief to the plaintiff as the merits of the controversy may require" (317 F. 2d at 849; R. 234).

The District Court held there was a private cause of action for violation of section 14(a) of the Act but that its jurisdiction was limited to entering a declaratory judgment that the proxy statement was false and misleading in material respects, that the proxies solicited were illegal and void under section 14(a) and that the merger and all agreements made pursuant thereto are void under section 29(b) of the Act for violation of section 14(a) (R. 215). The defendants did not file a cross-appeal from this order. In the Court of Appeals they conceded that the District Court had jurisdiction to declare the proxies invalid and notwithstanding their request that the District Court order be upheld, attacked that part of the order which held that the court had jurisdiction to grant a declaratory judgment that the merger and all agreements

made pursuant thereto are void (Br. for Def., Ct. of App. pp. 36, 41).

All the defendants here concede there is a private cause of action under § 14(a) but disagree as to the scope of relief. Defendant Case claims that jurisdiction extends only to the entry of an injunction (Case 10). The individual defendants go further and concede the court may enter a declaratory judgment as to the validity of the proxies (Indiv. 10). Although the defendants differ with each other as to the scope of relief, they are at war as to this issue not only with the Court of Appeals but with the District Court whose order they seek to have re-instated (Case 33; Indiv. 13).

2. The provisions of the Act and rules relevant to the issue of scope of relief are sections 2, 14(a), 27 and 29(b) (15 USCA 78(b), (n)a, (aa), (cc)b, and rules 14a-3 and 14a-9 thereunder (17 CFR 240.14A-3, 14A-9).

Section 2 of the Act sets forth in detail the necessity for regulation. Section 14(a) prohibits solicitation of proxies for securities listed on national securities exchanges in violation of the rules and regulations of the Securities and Exchange Commission ("Commission") promulgated thereunder. Rule 14a-3 makes a condition of the solicitation of proxies that the person solicited be furnished with a written proxy statement containing certain specified information. Rule 14a-9 prohibits the use of false and misleading statements with respect to any material fact or the omission of any material fact which would render any statement contained in the proxy solicitation false and misleading.

Section 27 of the Act vests in the United States District Courts exclusive jurisdiction of violations of the Act and the Commission's rules promulgated thereunder, in all suits in equity and actions at law brought to enforce any

liability or duty created by the Act or rules, provides for nationwide service of process, sets forth venue provisions with respect to such actions and for the review of judgments as provided by sections 225 to 347 of the Judicial Code (28 U. S. C. A. §§ 1254, 1291-4).

Section 29(b) of the Act provides that contracts are void if made in violation of the Act or rules, or if performance of the contracts involve a violation or a continuance of any relationship or practice in violation thereof. Such contracts are made void as to the rights of persons who in violation of the Act or rules have made or engaged in the performance of such contract, or who have acquired rights under such a contract with knowledge of the facts.

3. The Court of Appeals concluded that the District Court had jurisdiction to award damages or such other retrospective relief as the merits require.¹ The basis for this holding is that the obvious purpose of section 14(a) is the protection of the rights of shareholders by a full and fair disclosure of all material facts which affect corporate elections by proxy; and that the jurisdiction conferred by section 27 is broad enough to encompass a civil remedy to shareholders fully effective to protect

1. In view of the District Court's holding, not challenged by the defendants, that a private right of action may flow from violation of Section 14(a), it was unnecessary for the Court of Appeals to consider this question. The private right of action is well established: *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201 (C. A. 6, 1961); *Central Foundry Co. v. Gondelman*, 166 F. Supp. 429 (S. D. N. Y., 1958); *Rosen v. Alleghany Corp.*, 133 F. Supp. 858 (S. D. N. Y., 1955); *Horwitz v. Balaban*, 112 F. Supp. 99 (S. D. N. Y., 1949); *Tate v. Sonotone*, 5 S. E. C. Jud. Dec. 310 (S. D. N. Y., 1947). See also, *Mack v. Mishkin*, 172 F. Supp. 885, 889 (S. D. N. Y., 1959); *Tortron v. American Woolen Co.*, 122 F. Supp. 305, 308 (D. Mass., 1954). And see *Brown v. Bullock*, 194 F. Supp. 207, 231 (S. D. N. Y., 1961), affirmed on other grounds, 294 F. 2d 415 (C. A. 2), and *Phillips v. United Corp.*, 5 S. E. C. Jud. Dec. 445 (S. D. N. Y., 1947), where violations of the same proxy rules, made applicable by other provisions of the federal securities laws, were involved.

that right. The Court of Appeals relied primarily on *Bell v. Hood*, 327 U. S. 678 (1946), which held that federal courts have the power under a general grant of federal jurisdiction to grant all the relief commensurate with the effective enforcement of the statute and protection of rights created thereby, even if the statute does not specify the remedies that may be applied. The Court of Appeals also cited as authority, some of the cases arising under section 10(b) of the Act construing the jurisdictional grant under section 27 as including the power to award damages and other retrospective relief. *Ellis v. Carter*, 291 F. 2d 270 (C. A. 9, 1961); *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195 (C. A. 5, 1960), *cert. denied* 365 U.S. 814; *Smith v. Bear*, 237 F. 2d 79 (C. A. 2, 1956); *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (C. A. 2, 1951); *Kohler v. Kohler Co.*, 208 F. Supp. 808, 820 (E. D. Wis. 1962). The Court referred to two cases in which the same holding was made with respect to the cases arising under section 14(a). *S. E. C. v. Transamerica Corp.*, 163 F. 2d 511, 518 (C. A. 3, 1947), *cert. denied* 332 U. S. 847; *Mack v. Mishkin*, 172 F. Supp. 885, 889 (S. D. N. Y., 1959). The Court also cited *Deckert v. Independence Shares Corp.*, 311 U. S. 282 (1940).

In that case this Court had occasion to construe and apply Section 22 (a) of the Securities Act of 1933 which like Section 27 of the 1934 Act gave specified courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by" the act. (Emphasis supplied.) The Court had before it the question whether the Securities Act of 1933 authorizes purchasers of securities to maintain a suit to rescind a fraudulent sale and secure restitution of the consideration paid, and to enforce the right to restitution against a third party when the vendor is insolvent and the third party has assets in its possession belonging to the vendor.

Section 12(2) of the 1933 Act makes fraudulent sellers of securities liable to their buyers for rescission or damages. The Court upheld the right to maintain such an action. The following language from the opinion (p. 288) is particularly significant to this case:

"* * * in § 22 (a), 15 USCA § 77V, specified courts are given jurisdiction 'of all suits in equity and actions at law brought to enforce any liability or duty created by this sub-chapter.' The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case."

Finally, the Court of Appeals relied on the construction placed by the courts on other federal statutes which include a general grant of jurisdiction to the district courts such as the Investment Company Act of 1940 (15 U.S.C.A. 80a-35), *Aldred Investment Trust v. SEC.*, 151 F. 2d 254, 261 (C. A. 1, 1945), cert. denied 326 U. S. 795 (1946); Emergency Price Control Act of 1942 (50 App. U.S.C.A. 925(a)); *Porter v. Warnex Holding Company*, 328 U. S. 395 (1946); Fair Labor Standards Act of 1938 (29 U.S.C.A. 215(a), 217); *Mitchell v. Robert DeMario Jewelry Inc.*, 361 U. S. 288, 291 (1960); and the Sherman Act (15 U.S.C.A. 1, 2), *Schine Chain Theatres, Inc. v. United States*, 334 U. S. 110 (1948).

4. The opinion of the Court of Appeals below, was manifestly sound, but since the character of the remedy afforded by section 27 is before this Court for the first time, some further elaboration may be warranted.

The federal courts have power "to grant all of the relief which may be commensurate with the effective enforcement of the statute and the protection of rights

created thereby, notwithstanding the failure of the statute to specify the remedies which may be employed." *Bell v. Hood*, 327 U. S. 678, 684 (1946). The reasons for implying an action and for granting full relief are inseparable.

First. Private remedies are implied where the statute is a broadly based regulatory statute presenting the tasks of securing compliance which by its very size make private actions indispensable. The necessity for regulation of the Securities Exchange Act of 1934 is stated in the broadest terms. In section 2, Congress declared that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto." Another goal of the statute there stated is to make the regulation and control of securities transactions "reasonably complete and effective." The securities of thousands of publicly held corporations are traded in large volume each day on securities exchanges. Literally millions of transactions occur involving thousands of buyers and sellers and shareholders located throughout the United States and foreign countries. A large volume of proxy statements are processed through the Commission on the basis of which mergers, consolidations, dissolutions, sales of assets, and other corporate transactions affecting thousands of shareholders are effectuated. It is manifestly impossible for the Commission by itself to secure adequate compliance with the statute and its proxy regulations.

In addition to the magnitude of the task is the difficult nature of the problem. We here deal with false and misleading statements. The Commission must of necessity rely primarily on documents presented to it and the self-

serving assertions of those seeking approval. There is neither the time, and certainly there are not the resources available to the Commission to adequately investigate the numerous applications for approval of proxy statements submitted to it. Indeed, in many cases (as here), only an intensive and extensive discovery process can reveal the full extent of misrepresentation. As to the existing burden on the Commission, see its testimony before a subcommittee of the House Committee on Internal and Foreign Commerce, 87th Congress, 1st Session, Vol. 3, p. 8, quoted by Commission Chairman William L. Cary, *The Special Study of Securities Markets of the SEC*, 62 Mich. L. Rev. 557 at 558, 559 (Feb. 1964).

The existence of the private remedy serves a two-fold purpose. On the one hand, it is an ancillary remedy which serves to secure additional compliance; on the other hand, its existence acts as a deterrent to non-compliance. The private remedy to be effective must be one in which appropriate relief may be granted. Only a remedy of this character is consistent with a statute as broadly based as is the Securities Exchange Act of 1934, and which requires "regulation and control reasonably complete and effective," (§ 2; 78 U.S.C.A. § 78b).

Second. The Securities Exchange Act of 1934, and particularly the proxy provisions thereof, are designed to protect shareholders in publicly held corporations as a class.¹ The violation of proxy rules is a violation of duties imposed for the protection of shareholders. Shareholders should have an effective remedy to protect them against wrongs to them growing out of such violations. As stated in *Goldstein v. Groesbeck*, 142 F. 2d 422, 427 (C. A. 2, 1944), cert. denied, 323 U. S. 737, (holding that there was a right of action by stockholders of a registered holding company

1. *Howard v. Furst*, 140 F. Supp. 507, 510, n. 4 (S. D. N. Y. 1956).

for violations of the Public Utility Holding Company Act of 1935):

... a denial of a private right of action to those for whose ultimate protection the legislation is intended leaves legislation highly publicized as in the public interest in fact sadly wanting, and even delusive, to that end."

A remedy to be meaningful must extend beyond that of securing an injunction. In the short interval which usually elapses between the issuance of a proxy statement and the shareholders' meeting, there is insufficient time to study the proxy statement, secure counsel and ferret out the facts. The courts will not impose such an impossible burden upon those who seek relief from fraud.

More unrealistic is the suggestion (*Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201 (C. A. 6, 1961)), that relief be limited to securing a declaration of rights in the federal court and that thereafter a separate state court action be brought based upon such declaration. Such a procedure would defeat the purposes of the Act and make a mockery of the federal judicial process. The "horrors of split or piece-meal litigation" (*Ibid* at 214) include a prohibitive increase in time and expense of litigation. The *Dann* formula assumes that there will be a convenient state forum in which a plaintiff can again obtain personal jurisdiction over the defendants against whom he seeks to enforce a declaratory judgment. The serious roadblock to recovery is the fact that security transactions and particularly proxy solicitations are typically interstate in character, that officers and directors reside (as here; R. 180) in numerous states, and that problems of venue and of service may render impractical any state court action. The impossibility in many situations of securing jurisdiction over the persons of defendants make essential a federal remedy in which all necessary relief may be given. Finally,

a plaintiff forced into one or more state courts faces the likelihood of appeals to the appellate court or supreme courts of each of those states, in order to vindicate federal rights.

Third. Courts will imply a remedy where regulatory legislation has created new duties unknown or rare in the states. The only law regulating the solicitation of proxies is the Securities Exchange Act of 1934, except to the extent that state courts apply non-statutory fraud remedies. The ordinary principles of common law fraud do not impose burdens of affirmative disclosure. Under a variety of statutes where new duties have been created, courts have implied a federal cause of action even where no general grant of jurisdiction is included in the statute. Thus in *Steele v. Louisville & Nashville RR Co.*, 323 U.S. 192 (1944), this Court held that there was an implied federal remedy to a railroad employee growing out of the failure of the collective bargaining representative to perform the duty imposed upon it by the Railway Labor Act to represent him without discrimination because of race. Despite the absence of a jurisdictional grant, such as section 27 of the Act the Court not only recognized the right of a private cause of action, but also the right to complete relief.

"We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." (323 U.S. 192, 207.)

Similarly, see *Fitzgerald v. Pan American World Airways*, 229 F. 2d 499 (C. A. 2, 1956), and *Wills v. Trans World Airlines*, 200 F. Supp. 360 (S. D. Calif., 1960 (discrimination in violation of Civil Aeronautics Act); and *Reitmaster*

v. *Reitmaster*, 162 F. 2d 691 (C. A. 2, 1947) (wiretapping in violation of Communications Act).

The Act creates a new "federal law of management-stockholder relationships" and "provides stockholders with a potent weapon for enforcement of many fiduciary duties." *McClure v. Borne Chemical Company*, 292 F. 2d 824 at 834 (C. A. 3, 1961), cert. denied 368 U. S. 939.

Reasoning from the grant of jurisdiction under § 301(a) of the Labor Management Relations Act (29 U. S. C. A. § 185(a)), this Court has directed federal courts to develop a body of federal substantive law governing collective bargaining agreements, including the specific performance of such agreements.¹

Fourth. The interstate character of public securities transactions require uniform remedies. Section 2 of the Act clearly expresses the Congressional policy favoring uniformity in the regulation of securities transactions. Uniformity may be best achieved by recognition of a private cause of action in the federal courts, and would be destroyed if injured shareholders were relegated to the state courts. It is undoubtedly for this reason that Congress provided in section 27 of the Securities Exchange Act of 1934 that federal courts shall have exclusive jurisdiction of violations of the Act and the rules and regulations thereunder and "of all suits in equity and actions involved brought to enforce any liability or duty created by this title or the duties and regulations thereunder." This language is wholly consistent with the court's granting all appropriate relief.

1. See, e.g. *Textile Workers v. Lincoln Mills*, 353 U. S. 448 at 456-7 (1957); and cases implementing this decision, such as, *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564 (1960); *Smith v. Evening News Assoc.*, 371 U. S. 195 (1962); *Humphrey v. Moore*, 375 U. S. 335 (1964) (Preliminary Print); *Carey v. Westinghouse Electric Corp.*, 375 U. S. 261 (1964) (Preliminary Print).

and distinguish the numerous authorities relied on by the Court of Appeals that an implied right of action exists under section 27 for violation of section 10(b) and that complete relief may be given in such actions. Indeed, defendants state that no exception can be taken to these authorities. (Pet., 13). The defendants offer no argument as to why damages or other retrospective relief should be available to a shareholder under section 27 for violation of section 10(b) but not for violation of section 14(a). No effort is made to deal with that portion of the Court of Appeals' decision analogizing the section 10(b) actions with section 14(a) actions.

Jacobson v. New York, New Haven and Hartford Ry. Co., 206 F. 2d 153 (C. A. 1, 1953) affirmed *per curiam*, 347 U. S. 909 (1954) (Case 12-13) is wholly inapposite for here even the defendants concede that federal jurisdiction exists to vindicate § 14(a) violations.¹ The formula developed by the courts in refusing to recognize a private cause of action in relation to the Federal Safety Appliance Act is to a large extent based on the relationship between that act and the Federal Employers Liability Act and the availability of adequate state remedies. As we have noted above the case for implication is strong where state remedies are ineffective or inadequate in practice or where there is need for uniformity and when, as here, there is no comparable duty imposed by state law. These considerations do not apply to situations such as that involved in injuries

1. *Jacobson* was decided principally on the basis of a diversity of citizenship question: where the plaintiff is a resident of Massachusetts and the defendant a corporation incorporated under the laws of both Massachusetts and Connecticut, does diversity jurisdiction exist? *Jacobson* answered the question "No", relying upon a prior decision. The case was affirmed *per curiam* by this Court as defendants point out (Case 13); but the ground of the affirmance was strictly based upon the diversity of citizenship question and not the safety appliance question. The citations set out by this Court in the *per curiam* affirmance relate to the former point, not to the latter.

to workers where the states do offer redress by well recognized remedies. The extensive trial court resources at the state level make unnecessary the creation of a federal remedy. Considerations of this character best justify the Federal Safety Appliance Act's cases which hold that though the Act's safety requirements set the standard of care enforceable by the Government, remedies for injured workers are left to the states which may, if they choose, adopt the federal standards.¹ In addition to the inapplicability of these considerations to the 1934 Act there are important structural differences between that Act and the Federal Safety Appliance Act.²

Defendants' reliance on *Nashville Milk Co. v. Carnation Company*, 355 U. S. 373 (1958) (Case 13) is similarly irreconcilable with defendants' concession that a private action may be brought for violations of § 14(a), but in any event is misplaced. In holding that a suit for treble damages and injunction would not lie under the Clayton Act for violation of section 3 of the Robinson-Patman Act, the Court laid stress on the particular structure of federal legislation in the antitrust field, the vagueness of the language used in section 3 and the legislative history of the Robinson-Patman Act.

The defendants place heavy reliance on the maxim *expressio unius est exclusio alterius* (Case 13-15), the argument being that since express private actions are created under sections 9(e), 16(b) and 18(a) of the Act, Congress intended there be no other private remedy. To begin with, defendants are caught up in their own inconsistency. If the maxim is ineffective to bar prospective relief, the defendants having conceded that prospective relief may be

1. Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, 292 (1963).

2. Loss, *op. cit.*, p. 993, and note also his statement that the Federal Safety Appliance Act cases are *sui generis*.

granted both in section 13(b) and section 14(a) actions, how can it rise to bar retrospective relief?

This Court seemingly laid the maxim to rest with respect to the federal securities laws when it said as to the 1933 Act:

"Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." (*S. E. C. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350-1 (1943).)

Moreover the specific argument raised by defendants has been repeatedly rejected by the courts. See *Baird v. Franklin*, 141 F. 2d 238 at 245 (C. A. 2, 1944); *Fratt v. Robinson*, 203 F. 2d 627 at 632 (C. A. 9, 1953); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 at 514 (E. D. Pa. 1946); and *Loss, op. cit.*, pp. 937, 943.

Defendants next seek comfort in *Howard v. Furst*, 238 F. 2d 790 (C. A. 2, 1956) (Case 14215). This reliance is misplaced for the Second Circuit stated unequivocally, 238 F. 2d at 793, that it "left open the question of whether and to what extent Section 14(a) may be construed as creating substantive rights in an individual stockholder". In *Howard* a derivative action was brought on behalf of a corporation which had been merged with another corporation. The complaint alleged that shareholder approval had been obtained by a false and misleading proxy statement. The sole question before the Second Circuit was

whether the corporation had a right of action under section 14(a). The court, after a review of the Act, concluded that there was nothing to support the view that any substantive rights were created for its benefit. The court, however, points out that the statute authorized the formation by the Commission of rules and regulations "in the public interest or for the protection of investors" (238 F. 2d at 793), a key phrase which supports the decision of the Seventh Circuit below¹. In any event *Howard* is inapplicable since count 2 states an action for vindication of rights personal to shareholders. We should add the decision in *Howard v. Furst* stands in isolation. It has not been followed and has been questioned by the same and other courts.² We come back, however, to the proposition that defendants by conceding that a private cause of action will lie for prospective relief can hardly rely on a decision which would deny any relief.

Defendants seek to distinguish *Bell v. Hood, supra*, by making the astounding argument that section 27 is not a "general grant of jurisdiction" but merely a designation of the forum (Case 15). The plain language of section 27 is the best refutation of this absurd argument.³

Having asserted the narrow technical arguments we have

1. See also *Baird v. Franklin, supra*, 141 F. 2d at 244, note 4 and text thereto.

2. The late Judge Clark stated: " * * * I suspect that someday we shall have to disavow the much criticized case of *Howard v. Furst* * * * ". *Brown v. Bullock*, 294 F. 2d 415, 422 (C. A. 2, 1961) (concurring opinion). See also *Brown v. Bullock*, 194 F. Supp. 207, 232-234 (S. D. N. Y. 1961); *Hooper v. Mountaint States Securities Corp.*, 282 F. 2d 195, 203 (C. A. 5, 1960), cert. denied, 365 U. S. 814.

3. In this connection defendants seriously misrepresent the position of Professor Loss. Far from regarding section 27 as simply concerned with the designation of the forum (Case 15), Professor Loss has written extensively on the implications of the jurisdiction conferred by Section 27. See, for example, his discussion of section 27. *Loss, op. cit.*, pp. 957, 986-999, 1044 and 2005.

just discussed, defendants advance to higher ground with a survey of policy considerations (Case 16-18). It is their *ipse dixit* that "neither justice nor policy reasons favor creation of such a federal action. The creation of a private action would not assist at all in the effective enforcement of § 14(a)." But their statutory analysis supports our position, not theirs. After being informed that the scheme of the statute is to strengthen common-law standards by requiring full disclosure of all material facts in proxy statements, we are then advised that the function of the proxy rules is to aid the Commission. But, we ask, for whose benefit should the Commission be aided? Clearly for the benefit of the shareholders to whom the proxy statement is intended. It is they who suffer loss by reason of a false and misleading document. The powers of the Commission, the criminal sanctions and the other implementing devices mentioned by defendants, vis-a-vis proxy regulation, are designed for the protection of the shareholders to whom the proxy solicitation is addressed. We need look no further for justification for the creation of an effective private remedy under § 14(a).

Again the argument made is at odds with the holding of the District Court sought to be reinstated here by defendants and their admission that such a cause of action will lie for limited relief under § 14(a).

In relation to the foregoing argument defendants refer to *Lapchak v. Sisto*, UCH Fed. Secur. L. Rep., Par. 90,721 (S.D. N.Y. 1955) (Case 18). There the district court explicitly recognized that a complaint for violation of § 14(a) stated a claim. But, said the court, a complaint alleging a proxy solicitation to secure an increase in authorized stock followed by an unfair exchange, fails to state such a claim because of lack of causal connection between the proxy statement and the harm, there being no requirement for stockholder approval of the exchange. Since the complaint alleged

the authorization and exchange were part of a single plan, we find it difficult to understand why the court views each in isolation. In any event, the causal connection problem is not present in the case at bar. Defendants' quotation from *Howard* (Case 18) overlooks the fact that the Second Circuit unequivocally left open the question of a shareholder's right to sue under section 14(a). See discussion pp. 34-5, *supra*.

As though the issue before this Court was whether there should be an implied remedy under section 14(a), defendants next urge that affirmance of the decision below will lead this Court into a chamber of horrors. Problems are pictured as coming in thickets; indeed the federal system itself may become debilitated (Case 19). We think that this Court and the other courts in the federal system have demonstrated the stamina to meet and resolve these problems.¹ We do not mean to suggest that the implementation of private remedy for violation of section 14(a) is devoid of problems, but there have already been a host of decisions granting retrospective relief under the Act and none of the specters have emerged.²

1. For over 20 years the lower courts have fashioned implied remedies with full relief under various provisions of the Act. The courts have not met any insurmountable problems. For example, in connection with statutes of limitations which defendants think will pose problems (Case 21), see *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195 (C. A. 5, 1960); *Northern Trust Co. v. Essaness Theatres Corp.*, 103 F. Supp. 954 (N. D. Ill., 1952) and cf. *Holmberg v. Ambrecht*, 327 U. S. 392 (1946). Indeed, such problems that have arisen have been so infrequent and non-compelling that this case is the first case to our knowledge to reach this Court involving private actions under the Act.

2. See, e.g., *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195 (C. A. 5, 1960); *Errion v. Connell*, 236 F. 2d 447 (C. A. 9, 1956); *Fratt v. Robinson*, 203 F. 2d 627 (C. A. 9, 1953); *Baird v. Franklin*, 141 F. 2d 238 (C. A. 2, 1944), cert. denied 323 U. S. 737; *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E. D. Pa., 1946); and *Geismar v. Bond & Goodwin, Inc.*, 40 F. Supp. 876 (S. D. N. Y., 1941).

We need not stop to expose to the light of day each of the horrors depicted for us by defendants (Case 20-25).¹ A few observations, however, are in order. We question whether the defendants seriously believe that "except as affected by government antitrust suits, the validity of these vital corporate transactions is today entirely determined by state law" (Case 20). Nor should the defendants be overly agitated by the character of the relief which may be granted in this case should the plaintiff prevail. This case is an equity case and the chancellor has broad discretion to apply the relief that is most appropriate under the circumstances.

Defendants express great concern that "in an area which demands great certainty corporate decision-makers would be forced to work without any guidelines to actions." The guidelines that are relevant to this case are the proxy rules and a high standard of business ethics. As stated recently by this Court:

"A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry. As we recently said in a related context, 'It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry. *Silver v. New York Stock Exchange*, 373 U. S. 341, 366.'" *S. E. C. v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186-87 (1963).

Moreover, in the case at bar, we are not dealing with "unintentional non-compliance" (Case 21) but rather with

1. Most of them are distilled from problems discussed in a scholarly fashion and with no apprehension by Professor Loss. See Loss, *op cit.*, pp. 943-999. Indeed he concludes not only that a private remedy should be implied but that the court should have discretion to give full and complete relief.

wilful and serious violations (R. 179-197). In fashioning relief, in any event, the quality of the wrong goes to discretion, not jurisdiction of the court. See *Loss, op cit.*, p. 962.

Finally, the defendants' over-solicitude about the burden which may be placed upon the Commission by allowing private actions is belied by the position of the Commission in the Court of Appeals below.

Defendants place great reliance upon *Dann v. Studebaker-Packard Corporation*, 288 F. 2d 201 (C. A. 6, 1961). The complaint in *Dann* was filed by a stockholder of Studebaker who alleged a false and misleading proxy solicitation. The complaint asked that the court declare void the solicitation as in violation of section 14(a) and grant consequential relief. The trial court dismissed the complaint. The Court of Appeals reversed holding that a cause of action was stated under section 14(a). In a *dictum*, however, it concluded that federal jurisdiction was limited to declaratory relief relating to the validity of the proxies.

It should be observed that *Dann* does not adopt the prospective-retrospective dichotomy urged by Case but rather holds that where, as in *Dann*, diversity of citizenship is lacking, the jurisdiction of the federal court under section 14(a) is limited to a declaration of the invalidity of the proxies. In truth, Case concedes its position is wrong for the declaration allowed by *Dann* is but a first step toward retrospective relief.

The Court of Appeals below rejected the *Dann* rationale, pointing out at 317 F. 2d at 848 that its reliance upon *Gully v. First National Bank*, 299 U. S. 109, was misplaced because the holding of this Court in *Gully* was simply that "the case arose under state law, uninfluenced by the fact that a federal statute had a collateral bearing thereon." Further, the Court of Appeals below observed that the

Dann court "in its reasoning failed to distinguish between the question of jurisdiction and the question upon the merits of the case whether the plaintiffs were entitled to the relief which they sought. See, concurring opinion, Miller, C.J., 288 F. 2d at 217, 218." (317 F. 2d at 848.)

Every commentary that we have been able to find has been critical of the *dictum* of the *Dann* case.¹

Defendants argue (Case 23-5 and Indiv. 10-11) at great length that the merger itself is not voidable under § 29(b) and that if it is voidable dire consequences will result. Defendants again overlook their failure to appeal from the order of the District Court holding that there was jurisdiction to declare the merger void under § 29(b) (R. 213). Second, we think the merger agreement is a "contract made in violation of" § 14(a) and hence plainly voidable under § 29(b). Also, since the proxies may be viewed as contracts; they too may be declared void, as defendants concede (Indiv. 10-11). If so, the merger agreement, which required shareholder approval, must also fall.

But this does not mean that as a result of affirming the decision of the Court of Appeals all mergers will be voided "automatically" (Case 23). The complaint here does not expressly seek rescission of the transaction, although the court may grant such relief under the general prayer (R. 197-8). What the complaint does ask is to make whole the class of shareholders represented by plaintiff, either by obtaining money damages or, more equitably, addi-

1. See Loss, op. cit., pp. 2029-32; and the following notes and comments: 3 Boston College Ind. and Comm. L. Rev. 58 (1961); 75 Harv. L. Rev. 637 (1962); 62 Columbia L. Rev. 375 (1962); 40 Texas L. Rev. 405 (1962); 7 Villanova L. Rev. 125 (1961); 9 U.C.L.A. Rev. 232 (1962); and 1962 Duke L. J. 151. See also notes, 112 U. of Pa. L. Rev. 456 (Jan., 1964) and 52 Ill. Bar J. 240 (November, 1963) which criticize *Dann* and speak approvingly of the decision of the Court of Appeals below.

tional securities to compensate for the wrongful dilution of their proportionate interest in the Company (R. 196, 197-8). Again, however, these issues raised by defendants go not to the Chancellor's power but rather to his discretion under the facts and circumstances of each particular case.

The only citation added by the individual defendants is *Brouk v. Managed Funds, Inc.*, 286 F. 2d 901 (C. A. 8, 1961) (Indiv. 8). The information is supplied that certiorari was granted, 366 U. S. 958 (1961). What is not stated is that the decision was vacated by this Court as moot. *Managed Funds, Inc. v. Brouk*, 369 U. S. 424 (1962).

The Court of Appeals' decision is consistent with a long line of authority. The existence of a private cause of action for violation of the Act has been recognized by every circuit which has considered the question. With the exception of *Dann* discussed above, the right of the plaintiff to appropriate relief has never been questioned. A private right of action for violation of the proxy rules with jurisdiction and discretion to grant full relief is required both by the purpose of the Act and its design.

1. As to decisions under § 14(a), see cases cited note 1, p. 22, *supra*. As to § 10(b) see: *Ellis v. Carter*, 291 F. 2d 270 (C. A. 9, 1961); *Matheson v. Armbrast*, 284 F. 2d 670 (C. A. 9, 1960), cert. denied, 365 U. S. 870; *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195 (C. A. 5, 1960), cert. denied, 365 U. S. 814; *Reed v. Riddle Airlines*, 266 F. 2d 314 (C. A. 5, 1959); *Fratl v. Robinson*, 203 F. 2d 627 (C. A. 9, 1953); *Egypton v. Connell*, 236 F. 2d 447 (C. A. 9, 1956); *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (C. A. 2, 1951); *Slavin v. Germantown Fire Ins. Co.*, 174 F. 2d 799 (C. A. 3, 1949); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E. D. Pa., 1946). As to other sections of the Act, see: *Baird v. Franklin*, 141 F. 2d 238 (C. A. 2, 1944), cert. denied, 323 U. S. 737 (§ 6(b)); *Remar v. Clayton Securities Corp.*, 81 F. Supp. 1014 (D. Mass., 1949) (§ 7(c)); and *Geismier v. Bond and Goodwin, Inc.*, 40 F. Supp. 876 (S.D. N.Y., 1941) (§ 29(b)).

PART II.

**BRIEF IN RESPONSE TO ISSUES BEYOND THE
SCOPE OF THE PETITION FOR CERTIORARI.**

II.

THE QUESTION OF THE APPLICABILITY OF THE WISCONSIN SECURITY FOR EXPENSES STATUTE IS NOT PROPERLY BEFORE THIS COURT. IF THE QUESTION IS BEFORE THE COURT: (A) THE STATUTE IS INAPPLICABLE, AND (B) THE STATUTE, IF APPLICABLE, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

In our statement of the question presented (pp. 2-3; *supra*), we have shown that the question of the applicability of the Wisconsin security for expenses statute is not properly before this Court. If the Court should consider the issue, however, our position on the merits is set forth here.

A. The Wisconsin Security for Expenses Statute Is Inapplicable.

The Court of Appeals rejected defendants' argument that count 2 of the complaint is subject to the Wisconsin statute (Case 26-33). It said (317 F. 2d at 849):

"The court below erred in holding the Wisconsin statute applicable to count 2. *McClure v. Borne Chemical Co.*, 3 Cir., 292 F. 2d 824, cert. denied 368 U. S. 939 * * *; *Fielding v. Allen*, 2 Cir., 181 F. 2d 163, cert. denied, sub nom. *Ogden Corp. v. Fielding*, 340 U. S. 817 * * *."

The decision is correct because the Wisconsin statute applies only to derivative claims (i.e., "in the right of the corporation"). Count 2 states a claim on behalf of shareholders in their own right (i.e., "representative"), not the right of the corporation. The essence of count 2 is that shareholders were deprived of their right to be free from a false and misleading proxy statement and, as a

result, damaged (R. 197). The *Dann* case, upon which defendants rely, makes clear that the right asserted here is that of the shareholders. 288 F. 2d 201, 210-211.

The Court of Appeals held that count 1 of the complaint stated a claim "on behalf of the stockholders individually" (317 F. 2d at 845)¹ and that count 2 alleged by reference "substantially all of the charging paragraphs contained in count 1 * * * " (*Id.* at 846). The rationale of the Court of Appeals that count 1 states an individual claim (317 F. 2d at 841-5) applies with equal force to count 2. Case's argument, that the court seemed to realize * * * the claim is derivative * * * (Case 26) expresses defendant's hope, not the court's realization.²

Assuming *arguendo*, that count 2 does state a derivative claim, the claim arises from and is bottomed on federal law, and, accordingly the state security for expenses statute is inapplicable. Every court considering the question has so held.

In a lengthy and well reasoned opinion by Chief Judge Biggs, the Court of Appeals for the Third Circuit held that a state security for expenses statute is inapplicable to an action arising under § 10b of the 1934 Act. *McClure v. Borne Chemical Co.*, 292 F. 2d 824 (C. A. 3, 1961), cert. denied 368 U. S. 939.

Similarly, in *Fielding v. Allen*, 181 F. 2d 163 (C. A. 2, 1954), cert. denied *sub nom. Ogden Corp. v. Fielding*, 340 U. S. 817, the court determined that in an action attacking the sale of corporate stock upon the ground that it violated

1. Defendants did not seek review of the decision below as to count 1.

2. If speculation is in order we think it more likely that the Court of Appeals, in citing *McClure* and *Fielding, supra*, indicated only that if, *arguendo*, count 2 were derivative, the state statute could still not be applied. We think our assumption is more plausible in view of the Court's holding as to count 1.

provisions of the Interstate Commerce Act, a state security for expenses statute was inapplicable even though the plaintiff there alleged not only federal question jurisdiction but also diversity jurisdiction.

See also *Hoover v. Allen*, 180 F. Supp. 263, 267 (S.D.N.Y., 1960); and *Stella v. Kaiser*, 81 F. Supp. 807, 808-9 (S.D. N.Y., 1948), both of which hold that state security for expenses statutes are inapplicable to claims grounded on the 1934 Act. "Actions based on federal law are not subject to the state statutes on security for costs." *Loss, op. cit.*, p. 951; and see also 6 Moore's Federal Practice (2nd Ed., 1953), Par. 54.73, p. 1331. Even the District Court's opinion and order hold that the Wisconsin statute cannot be applied to the federally based claim for violation of the Act (R. 209-213); and defendants want that order reinstated (Case 33, Indiv. 13).

Defendants endeavor (Case 29-30) to avoid the impact of *McClure* and *Fielding* by a claim that both of these cases rest upon the decision of this Court in *Payne v. Hook*, 7 Wallace 425 (1869). They claim that *Payne v. Hook*, holding that the Rules of Decision Act did not apply to equity cases, was overruled by *Mason v. United States*, 260 U. S. 545. Hence, they say, *McClure* and *Fielding* fall. The Second and Third Circuits, writing in 1950 and 1961, were perfectly well aware of the 1922 *Mason* decision. What they said was spoken by way of analogy. *McClure* quotes from *Fielding*, making this matter quite explicit:

"But we think that the policy enunciated in *Payne v. Hook*, *supra*, retains its vigor in non-diversity cases. In such cases, if a form of relief exists within the ambit of the federal court's historic equity jurisdiction, it should be available without reference to the peculiar requirements of local law. As Professor Moore puts it: 'Whether equitable relief should be granted and to what extent in federal matters is a matter properly within the domain of federal equity jurisprudence.

Here, unlike in diversity cases, the federal courts are free of state remedial law, '2 Moore's Federal Practice (2d ed.), Par. 2.09, p. 456.' (292 F. 2d 824 at 833.)

None of the other authorities cited by defendants is in point. The authorities at Case 26-27 relate to classic derivative situations such as waste of corporate assets. They are inapposite here to a claim for violation of stockholders rights by means of a false and misleading proxy statement under §14(a) of the Act.

Defendants argue (Case 27) it was the corporation rather than the shareholders who were injured if anyone was by the false proxy statement. This contention is made in the teeth of one of defendants' principal authorities, the *Dann* decision, *supra*, 288 F. 2d at 210-211. Defendants also make the unwarranted, if not unconscionable suggestion that plaintiff and the other members of his class can be made whole by having recovery run to the corporation (Case 27). Case would ignore the fact that: (1) for over seven years it has used all of its resources to raise every conceivable legal impediment to block *any* recovery; and (2) the old ATC shareholders as well as the wrongdoing defendants are shareholders of Case and would therefore share in the recovery.

The holding in *Cohen v. Beneficial Industrial Loan Company*, 337 U. S. 541 (1949), is limited to diversity actions (Case 28). Recognizing the limitation of *Cohen*, defendants cite *Levitt v. Johnson*, CCH Fed. Sec. L. Rep., Par. 91,304 (D. C. Mass. 1963) (Case 29). But that case is inapposite since it involved the application of the "Massachusetts Rule" which bars a derivative action unless it is approved by an independent majority of stockholders. *Levitt* did not involve the question here considered. The Massachusetts district court's reliance on *Housman v. Buckley*, 299 F. 2d 696 (C. A. 2, 1962) was misplaced since

in that case jurisdiction was based on diversity of citizenship, not on a federal question. The district court recognized its decision was contrary to *Rogers v. American Can Co.*, 305 F. 2d 297, 304, 317 (C. A. 3, 1962) which holds that the right of a shareholder to bring a derivative action for violations of federal (anti-trust) law is to be measured by federal law.

Defendants' weak position is underlined by their citing *Board of Commissioners of Jackson County v. United States*, 308 U. S. 343 (1939) (Case 31), a case which supports plaintiff. In *Jackson County* the United States brought suit on behalf of its Indian ward to recover taxes improperly levied on property exempted by treaty. The only issue before the Court was whether the United States was entitled to interest prior to judgment. The Court said (pp. 349-350):

"... The starting point for relief in this case is the Treaty of 1861, exempting M-Ko-Quah-Wah's property from taxation. Effectuation of the exemption is, of course, entirely within congressional control. But Congress has not specifically provided for the present contingency, that is, the nature and extent of relief in case loss is suffered through denial of exemption. It has left such remedial details to judicial implications. Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the lawmaking agencies of Kansas."

The Court held that as a matter of federal law and under the particular circumstances it was not fair to require the state to pay interest. True, in reaching this decision the Court considered state law which permitted interest to no one. But the Court said also (pp. 350-1):

"Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; * * * Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights. * * * Nor may the right to recover taxes illegally collected from Indians be unduly circumscribed by state law. * * *

In short, all the federal policy reasons militating for a private right of action with complete relief, which reasons are set forth in Part I above, militate against engrafting "unique and controversial" state statutes that "do not embody traditional principles of law" upon federal laws creating rights for the protection of the investing public at large. *McClure, supra*, 292 F. 2d at 829-835; see also *Sola Electric Company v. Jefferson Electric Company*, 317 U. S. 173 at 176 (1942).

B. The Wisconsin Security for Expense Statute, if Applicable, Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

The Wisconsin security for expense statute¹ requires that plaintiff be the holder of 3% of the common stock of Case—or 67,883 shares valued at \$1,358,000.00—in order to maintain a derivative suit without posting security for defendants' expenses, including attorney fees. The statute differs substantially from the other type of security for expense statute found in New Jersey and a few other states, in failing to provide an alternative standard based on a fixed and reasonable dollar amount of stock ownership. Its effect is to nullify the derivative action as to publicly held Wisconsin corporations.

1. The statute is set forth at Case 3.

This Court sustained the New Jersey security for expense statute (exempting shareholders owning 5% of the stock or stock having a market value of \$50,000), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), but has never passed upon the validity of a statute like Wisconsin's. *Gaudiosi v. Mellon*, 269 F. 2d 873 (C. A. 3, 1959), cert. denied 361 U. S. 902, distinguished and discussed below, upheld the Pennsylvania statute, the only statute similar to Wisconsin's. We think the significant distinction between the Wisconsin and the New Jersey type statute renders the former violative of the Due Process and Equal Protection clauses of the Federal Constitution.¹

The only practical check on management's abuse of the corporation is the derivative suit. See, *Cohen*, *supra*, 337 U. S. 541, 548; and, in addition to the articles collected in *McClure*, *supra*, 292 F. 2d at 829, see Zlinkoff, *The American Investor and the Constitutionality of Section 61-B of the N. Y. General Corporation Law*, 54 Yale L. J. 352 (1945).

Because of real or fancied abuses of the derivative suit in the form of "strike" suits and "secret settlements," the security for expense statute evolved in New York in 1944. Whether there was any real abuse in New York when that statute was enacted is debatable (see *McClure*, *supra*, 292 F. 2d at 829) but it is clear that strike suits were no problem in Wisconsin when the latter statute was adopted in 1945. See 1948 Wis. L. Rev. 580, 586. Perhaps the most telling criticism of this legislation is, "Had the legislators really been concerned with the so-called 'abuse' of stockholders' suits, the extortionate secret settlement, the remedy was painfully obvious: to bar secret settlements." Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 Colum. L. Rev. 1, 3 (1947).

1. It doubtlessly violates the Wisconsin Constitution also but since the state courts have not decided its validity that question may not be passed upon here. *Cohen*, *supra*, at 547.

It was precisely by barring secret settlements that Congress and this Court effectively precluded any possible abuse of the derivative suit in the federal courts. Rule 23(e), Federal Rules of Civil Procedure, forbids dismissal or compromise without approval by the court after notice to the shareholders. Other safeguards against abuse are built into Rule 23(a) and (b). Similar safeguards are afforded in Wisconsin independent of the security for expense provisions. See W. S. A. § 180.405 (1) (2) (3) and 1956 Wis. L. Rev. 322. Thus "strike" suits are unlikely in Wisconsin state or federal courts should this Court invalidate § 180.405(4).

Generally, security for expense statutes provide that shareholders with relatively small holdings may be required to post bond for defendants' expenses, including attorney fees, as a condition precedent to maintaining a derivative suit. The theory is that the derivative suit is most abused by shareholder-plaintiffs who have relatively minor financial interests in the corporation.

The state legislatures have differed in their concept of what constitutes a reasonable minimal financial interest. However, except for Wisconsin and Pennsylvania, all have found that a shareholder with a \$50,000 investment has a substantial interest as to whom the statute cannot be applied. The New York Act exempts plaintiffs whose shareholdings amount to 5% of the corporate stock or have a market value of \$50,000 (N. Y. Gen. Corp. Law § 61-b). The New Jersey statute provides for the same alternative exemptions as New York—5% or \$50,000 (N. J. S. Anno., § 14:3-15). The Maryland and North Dakota statutes also have exemptions in the alternative but the market value necessary to render the statute inapplicable is only \$25,000 (Md. Rule of Procedure, Rule 328, § b (1961); N. D. Century Code Anno., (1960), § 10-19-48). The California statute does not depend on financial in-

terest; it may be applied only where the court finds after hearing that there is no reasonable probability the action will benefit the corporation or that the party seeking security did not participate in the transaction complained of (Calif. Corp. Code § 834).

Only the Wisconsin and Pennsylvania acts fail to provide an alternative exemption based on reasonable market value (W.S.A. § 190.405(4); Penna. Stat. Anno. (Purdon), Title 12, § 1322).

As applied here, the Wisconsin statute requires plaintiff to own 3% of the Case common stock (outstanding at the time of the merger) or 67,883 shares. At the time the district court first held the statute applicable and required security of \$75,000 (R. 536), the market value of 67,883 shares of Case common stock was about \$1,358,000. In contrast, plaintiff's 2,000 shares were then worth about \$40,000. Under the Maryland and North Dakota statutory tests of financial interest, plaintiff would have been exempted. Under the New York and New Jersey acts, plaintiff would have been close to the market value exemption and if only one other shareholder with 500 shares joined the action, security could not be required.

The uncontrovertible fact is that no shareholder may bring a derivative action on behalf of Case under the test of financial interest laid down by the Wisconsin statute. The list of shareholders of Case as of October 16, 1956 (the record date for voting on the merger) shows that there were more than 6,700 shareholders of record located all over the United States and in some foreign countries. No shareholder owned more than 67,883 shares except Merrill, Lynch, Pierce, Fenner & Beane, a broker on the New York stock exchange, which held 125,803 shares in its name for customers. The deposition of this brokerage firm showed, however, that of the beneficial owners of

these shares only one owned 2,000 shares and only twenty-four shareholders owned from 1,000 to 1,999 shares. The remaining shares were all owned in lots of less than 1,000 shares. (See deposition of Thomas Meehan taken June 13, 1957, filed May 1, 1958, pp. 2 ff. Ex. 29 (213-238).)

Apart from stockbrokers on the New York Stock Exchange, the stockholders' list shows that only 42 shareholders of record held stock in lots of 2,000 or more. Plaintiff, with 2,000 shares, was therefore one of the largest stockholders in the company..

Even the combined "financial interest" of all the Case directors and officers—31,043 shares of common stock worth about \$620,000, would not meet the statutory test (R. 34).

It is, of course, common knowledge that the shares of publicly held corporations are widely distributed. A 1941 TNEC study showed that 86% of the total shareholdings of common stock were distributed in lots of 100 shares or less (*Granby*, TNEC Rep., Survey of Shareholdings in 1,710 corporations with Securities Listed on a National Securities Exchange, Monograph 39 (1941); cited in Zlinkoff, *The American Investor and the Constitutionality of Section 61-b*, 54 Yale L. J. 352, 368 (1945)). As we have shown, Case shareholdings are also widely distributed. There is also no doubt that the Wisconsin statute if applied to other publicly held Wisconsin corporations would require shareholdings of enormous and insurmountable proportions. A random sample of the value of a 3% holding in Wisconsin corporations indicates a range of \$223,000.

1. The second largest shareholder was Francis I. DuPont & Co., also a broker on the New York Stock Exchange. Of the 61,209 shares it held for beneficial owners, only two beneficial owners held 2,000 share lots and only ten beneficial owners held shares in lots of 1,000 to 1,999. (See deposition of Douglas Graham taken June 11, 1957, filed May 1, 1958, pp. 16 ff. Exs. 9, 11.)

to \$3,466,000 (as of 1955 market prices). See 1956 Wis. L. Rev. 322, 325.

The conclusion is therefore inescapable that the Wisconsin statute effectively and completely closes the courts to derivative suits brought by shareholders of publicly held Wisconsin corporations generally and Case particularly, regardless of whether the action is well founded or the shareholder has a substantial financial interest in the corporation. See also 1948 Wis. L. Rev. 580, 593. Nor is there any alternative remedy available to bring directors to account for wrongdoing to the corporation (except as here where the wrong is to the shareholders who may bring a representative action). Without the derivative suit "there would be little practical check on such abuses." *Cohen, supra*, 337 U. S. 541, 548.

While the states may constitutionally impose limitations on the bringing of derivative suits based on alternative financial tests—i.e., percentage of stock or reasonable market value, as in *Cohen, supra*, 337 U. S. 541, they are not free to impose arbitrary and unreasonable impediments, so as to foreclose the only existing remedy. The requirement that plaintiff own 67,883 shares of Case common stock worth \$1,358,000 in order to maintain a derivative action to hold directors for breach of fiduciary duty to their corporation is arbitrary and capricious and a denial of due process and equal protection of the law.

The essence of procedural due process is that a litigant may not be deprived of his rights without legal process. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Paris Trust and S. Co. v. Hill*, 281 U. S. 673, 682

(1930) (refusal to permit plaintiff to enjoin tax collector where no other remedy available held a denial of due process). The Wisconsin statute effectively closes the courts to derivative suits—the only means by which the right of the corporation may be protected by shareholders from wrongdoing directors—and affords no “real” alternative. It plainly denies due process of law.

Firmly engrained in substantive due process and equal protection is the principle that the courts “should be open to all persons who in good faith and upon probable cause believe that they have suffered wrongs” (*In re Keenan's Will*, 188 Wis. 163, 205 N. W. 1001, 1006 (1925)), and that a person shall not be denied (or receive) justice in relation to the size of his pocketbook. *Griffin v. Illinois*, 351 U. S. 12 (1956) (failure to afford indigent prisoner a free trial transcript so as to effectively cut off right to appellate review violates Fourteenth Amendment); *Labowe v. Balthazor*, 180 Wis. 419, 193 N. W. 244 (1923) (invalidated statute requiring advance payment of jury fee of \$24.00 in order to obtain trial by jury).

If a state may not say that “all men possessed of a certain wealth” shall be subject to attorney fees of parties successfully suing them [*Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 155 (1897) (holding invalid a statute imposing attorney fees of up to \$10 against carriers who refused to pay small claims)], it may not say that the “poor” shall indemnify the “rich” for attorney fees.

If “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has . . .” [*Griffin v. Illinois*, 351 U. S. 12, 19 (1956)], there can be none when he can get no trial at all.

Assuming, as is doubtful (see 1948 Wis. L. Rev. 580, 586), that the “strike” suit was or is really a problem in Wisconsin and that this statute was designed to meet that

problem, since the effect of the statute is to bar all derivative suits on behalf of publicly held corporations, it bears no reasonable relationship to the evil sought to be remedied. Even the Revision Committee Note (1953) to W. S. A., § 180.405 recognized that the statute bears no relation whatever to its supposed object:

... * * * The problem in the shareholder's derivative action is the possibility of its abuse for personal profit. *This possibility bears no relation to the number of shares held by the plaintiff or his ability to furnish security for expenses.* * : * * (Emphasis supplied.)

Here, as in *Royster Guano Co. v. Virginia*, 253 U. S. 412, 416 (1920),

... * * * It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation! * * *

See also *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928).

For the foregoing reasons we think the Wisconsin statute, as applied here, requiring as it does a plaintiff to own 67,883 shares of Case common stock worth \$1,358,000 in order to maintain a derivative suit without posting security for defendant's attorneys' fees, is violative of the Fourteenth Amendment of the United States Constitution.

As stated above, the Pennsylvania security for expense statute, similar to the Wisconsin statute in that it provides no alternative market value exemption, was held constitutional in *Gaudiosi v. Mellon*, 269 F. 2d 873 (C. A. 3, 1959) cert. denied 361 U. S. 962. In that opinion, which dealt with a number of other issues, there is scant discussion of the constitutional issue and the opinion does not consider the significant distinction between the Pennsylvania-Wisconsin type statute and the New York-New Jersey type

statute. The court's total statement on the issue is (page 878): "Plaintiff's contention that the Pennsylvania statute providing for security for expenses in derivative actions is unconstitutional ignores our implicit holding to the contrary in *Knapp v. Bankers Securities Corp.*, 230 F. 2d 717, and *Murdock v. Follansbee Steel Corp.*, 213 F. 2d 370." In the *Knapp* case the court held only that the statute was inapplicable to an action seeking declaration of dividends. In the *Murdock* case the court held only that a beneficial owner of 5% or more of the shares of the stock of the corporation was not subject to the security statute. Under ordinary canons of construction we do not see anything "implicit" as to constitutionality in holdings that the statute is inapplicable on the facts.

The Supreme Court of Pennsylvania in a more recent decision, *Reifsnyder v. Pittsburgh Outdoor Adv. Co.*, 405 Pa. 144, 173 A. 2d 319 (1961), had before it the alleged inapplicability and invalidity of the Pennsylvania statute. The court held, however, that a minority shareholder-action to prevent the dilution of his own votes was a direct or representative action by the shareholder as to which the security statute could not be applied. It therefore found it unnecessary to pass on the constitutionality of the statute but, it should be noted, did not mention that the act had been previously upheld under the Federal Constitution in *Gaudiosi v. Mellon* and stated further, as do we, that there are "significant distinctions between the Pennsylvania and New York statutes" (173 A. 2d 319, 320; note 1).

The Wisconsin statute is unconstitutional and, if the issue is reached by this Court, should be stricken down.

CONCLUSION.

The decision of the Court of Appeals with respect to count 2 of the complaint should be affirmed.

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1

APPENDIX

Securities Exchange Act of 1934, §§ 2 and 28(a), 15 U. S. C. §§ 78b, 78bb(a).

§ 78b. Necessity for Regulation (§ 2).

For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

- (1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.


(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

§ 78bb(a). Effect on Existing Law (§ 28(a)).

(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

United States Constitution, Amendment 14, § 1.

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 402

J. I. CASE COMPANY, ET AL., PETITIONERS

v.

CARL H. BORAK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (R. 200-212) is unreported. The opinion of the court of appeals (R. 217-234) is reported at 317 F. 2d 838.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1963 (R. 235). The petition for a writ of certiorari was filed on August 26, 1963, and was granted on November 12, 1963 (R. 236; 375 U.S. 901). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a civil action brought by a stockholder attacking a merger allegedly procured through circulation of false and misleading proxy solicitation materials in violation of Section 14(a) of the Securities Exchange Act of 1934, a federal district court may grant relief necessary to redress the violations, or is limited to declaring the validity or invalidity of the proxy solicitation.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is responsible for enforcement of the Securities Exchange Act and the rules thereunder, and it reviews proxy solicitation materials prior to their distribution. The character of such review, however, is necessarily limited, and material which initially appears to satisfy the governing disclosure requirements sometimes turns out, after more intensive study by interested stockholders, to contain false and misleading information. Also, limitations of manpower prevent the Commission from bringing enforcement actions for all violations. Private actions based upon violation of the proxy rules thus are an important supplement to the Commission's own enforcement activities in accomplishing the fair corporate suffrage which the statute is designed to promote. The Commission urges affirmance of the decision below which, by upholding not only the right of a stockholder to maintain an action based on violation of the federal proxy statute, but also the authority of the federal courts to grant whatever relief is necessary to redress such

violations, sustains an important method of statutory enforcement.

STATUTES INVOLVED

Section 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U.S.C. 78n(a), provides as follows:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Pursuant thereto the Commission has promulgated Rules 14a-1—14a-11, 17 C.F.R. 240.14a-1—240.14a-11, set forth in Appendix B to the Brief for J. I. Case Company (pp. 18-39), hereinafter referred to as the "proxy rules."

Section 27 of the Act, 48 Stat. 902, 15 U.S.C. 78aa, provides in pertinent part as follows:

The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and

of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. * * *

STATEMENT

On November 13, 1956, respondent, a stockholder of J. I. Case Company (Case),¹ instituted this action in the United States District Court for the Eastern District of Wisconsin seeking (1) a judgment declaring a proposed merger between Case and American Tractor Corporation (ATC) illegal and void and (2) an order enjoining Case and certain of its officers and directors from acting to consummate the merger (R. 1-16). Respondent did not succeed in preventing the merger (R. 86-89) and since 1956 has filed three amended complaints seeking to undo the merger and obtain other relief (see R. 111, 160, 179). This brief will discuss the issues presented by Count Two of the

¹ J. I. Case is a Wisconsin corporation. Its securities are registered on the New York Stock Exchange (R. 24).

Third Amended Complaint (R. 196-198), which alleges violations of the Securities Exchange Act of 1934.²

In Count Two, respondent alleges that on October 15, 1956, petitioners solicited, or permitted the use of their names to solicit, the proxies of Case stockholders for use at a special stockholders' meeting on November 15, 1956, at which a vote was to be taken upon a proposed merger with ATC (R. 197, 182); that the proxy solicitation material was false and misleading (R. 197, 189-192) in violation of Section 14(a) of the Securities Exchange Act (*supra*, p. 3) and Rule 14a-9 thereunder (17 C.F.R. 240.14a-9) (R. 197); that the merger was approved by a small margin of votes and was consummated shortly thereafter (R. 197, 182); that the merger would not have been approved but for the materially false and misleading statements in the proxy solicitation material (R. 197, 192); and that Case stockholders were severely damaged by these violations of the statute and proxy rules (R. 197). Respondent asked the court to declare that the proxy solicitation material was false and misleading; that the proxies solicited thereby were illegal and void and that the merger and all agreements entered pursuant thereto are void. Respondent requested damages for the injury sustained by himself and all other stockholders similarly situated and "such other and further relief * * * as equity shall require" (R. 197-198). Jurisdiction was invoked un-

² Count One is based exclusively upon the laws of the State of Wisconsin and is not in issue before the Court.

der Section 27 of the Securities Exchange Act (*supra*, pp. 3-4), and on grounds of diversity of citizenship (28 U.S.C. 1332) (R. 196).

Case moved for an order requiring respondent to furnish security for expenses pursuant to Section 180.405(4) of the Wisconsin Statutes (Case Br. 3) and directing dismissal of the action in the event the security was not provided (R. 198-199). The Wisconsin statute authorizes such an order in actions brought "in the right of" a corporation (R. 219).

The district court ruled that the Wisconsin statute was inapplicable to a claim arising under federal law. Relying upon *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201 (C.A. 6), the court held that Section 27 of the Securities Exchange Act gave it jurisdiction to grant declaratory relief in a private suit alleging violation of Section 14(a), but that additional equitable relief and damages were available only under State law. Accordingly, the court concluded that these claims were subject to the State security-for-expenses statute (R. 200-212) and ordered that unless security, set in the amount of \$75,000, were posted, Count Two of the complaint would be dismissed, except to the extent that it sought a declaration that the proxy solicitation material was false and misleading and that the proxies, the merger and all agreements entered pursuant thereto were void (R. 213). Upon the representation by counsel for respondent that the required security would not be posted, the district court ordered stricken those portions of the complaint seeking damages and "such other and fur-

ther relief * * * as equity shall require" (R. 214, 198).

On an interlocutory appeal under 28 U.S.C. 1292(b), the court of appeals reversed. It stated that "[t]he obvious purpose of Section 14(a) is the protection of the right of shareholders to a full and fair disclosure of all material facts which affect corporate elections by proxy" and that "the jurisdiction conferred by Section 27 must be broad enough to effectively protect that right" (R. 233). Accordingly, it held that the district court had jurisdiction to "award damages or such other retrospective relief * * * as the merits of the controversy may require" and that the claims for such relief were claims arising under federal law to which the State security-for-expenses statute was inapplicable (R. 234).

SUMMARY OF ARGUMENT

The only issue properly before the Court is whether in a private action by a stockholder attacking a merger allegedly procured through circulation of false and misleading proxy materials in violation of Section 14(a) of the Securities Exchange Act of 1934, the federal courts may grant relief necessary to redress the violations, including damages and rescission:

I

The right of a private party to sue under Section 27 for violations of Section 14(a) and the proxy rules has been repeatedly recognized, as have implied rights of action for violations of numerous other provisions of the federal securities laws. The right stems from

the general rule that where the purpose of a statute is to protect a particular class of persons, a violation will result not only in the imposition of the sanctions provided by the statute, but also in a right of action in favor of persons in the protected group who have been injured by the violation.

It makes no difference whether respondent's action is classified as a direct action for redress of injuries he has suffered or as a derivative suit for injuries to the corporation. Section 14(a) seeks to prevent persons from securing authorization for corporate action by means of inadequate disclosure. Since violations of the proxy rules may injure the stockholders both directly and indirectly through injury to the corporation, the policies which have led the courts to recognize a private right of action apply with equal force in each case.

II

The court below correctly held that the district court had jurisdiction under Section 27 to grant whatever relief might be appropriate under the circumstances of a particular case. *Bell v. Hood*, 327 U.S. 678, 684, makes clear that "where federally protected rights have been invaded * * * courts will be alert to adjust their remedies so as to grant the necessary relief." This Court has applied this doctrine in many situations, upholding relief other than that specified in the particular statutes involved: i.e., restitution for overcharges, reimbursement for underpayments, and divestiture of acquisitions under statutes providing only for injunctive relief.

Damages and other retrospective relief are effective deterrents against violations of the proxy rules, particularly where the facts regarding violations might not be apparent until after the proxies have been voted. The fact that the relief sought might affect state-created relationships, including the possible voiding of a merger, does not deprive the federal courts of the power to grant whatever relief is appropriate to redress the violations of the proxy rules. To limit the jurisdiction of the federal courts to the granting of declaratory relief would render the private right of action under the proxy rules largely ineffective.

ARGUMENT

INTRODUCTION

This case arose upon an appeal from the district court's order dismissing that portion of the respondent's complaint which seeks relief, other than declaratory relief, for alleged violations of Section 14(a) of the Securities Exchange Act and the Commission's proxy rules. The district court held that it had no jurisdiction over these claims under federal law, that respondent's rights, if any, were dependent upon State law, and that, accordingly, the State statute requiring the posting of security for expenses was to be applied. Respondent's failure to post security led to the dismissal of those claims. The court of appeals reversed, holding that federal rather than State law governs respondent's claims for damages and other relief, and that the State statute is not applicable to such claims.

The sole question presented in the petition for certiorari was as follows (Pet. 2):

Whether Sec. 27 of the Act grants a Federal cause of action for rescission or damages to a corporate stockholder in respect of a consummated merger which was authorized pursuant to the use of a proxy statement alleged to have contained misleading statements violative of § 14(a) of the Act.

In its brief on the merits, petitioner Case now argues (Case Br. 26-33) a further issue—whether the Wisconsin security-for-expenses statute is applicable to federally-created rights of action under the Securities Exchange Act. Since that issue was not raised in the petition, under Rule 40(1)(4)(2) of the Revised Rules of the Court,³ and this Court's settled practice, it is not properly before the Court. We therefore express no views thereon.⁴

³ This Rule provides: "The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

⁴ We note, however, that the decision below that the statute is inapplicable is in accord with *McClure v. Borne Chemical Company*, 292 F. 2d 824 (C.A. 2), certiorari denied, 368 U.S. 939, *Fielding v. Allen*, 181 F. 2d 163 (C.A. 2), certiorari denied *sub nom. Ogden Corp. v. Fielding*, 340 U.S. 817, and *Phelps v. Burnham*, CCH Fed. Sec. L. Rep. ¶ 91,327 (C.A. 2).

THE FEDERAL COURTS HAVE JURISDICTION OF A PRIVATE ACTION TO REDRESS INJURIES SUSTAINED AS A RESULT OF VIOLATIONS OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT

A. A PRIVATE PARTY MAY MAINTAIN AN ACTION BASED ON VIOLATIONS OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT

Section 27 of the Securities Exchange Act grants jurisdiction to the federal courts over violations of the Act and rules thereunder and "of all suits in equity and actions at law brought to enforce any liability or duty created [thereby]." The right of a private party to sue under Section 27 for violations of Section 14(a) of the Act and the proxy rules thereunder has been repeatedly recognized by the courts. See *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201 (C.A. 6); *Mack v. Mishkin*, 172 F. Supp. 885 (S.D.N.Y.); *Central Foundry Co. v. Gondelman*, 166 F. Supp. 429 (S.D.N.Y.); *Weeks v. Alpert*, 131 F. Supp. 608 (D. Mass.); *Rosen v. Alleghany Corp.*, 133 F. Supp. 858 (S.D.N.Y.); *Dunn v. Decca Records, Inc.*, 120 F. Supp. 1 (S.D.N.Y.); *Textron v. American Woolen Co.*, 122 F. Supp. 305 (D. Mass.); *Horowitz v. Balaban*, 112 F. Supp. 99 (S.D.N.Y.); *Doyle v. Milton*, 73 F. Supp. 281 (S.D.N.Y.); *Tate v. Sonotone Corp.*, 5 S.E.C. Jud. Dec. 310 (S.D.N.Y.); Petitioners appear to concede the existence of this right.⁵

⁵ Petitioner Case (Br. 10) expressly states that it does not question that shareholders may "seek prospective relief" for such violations. The other petitioners, by urging that *Dann v. Studebaker-Packard Corp.*, *supra*, was correct (Barr Br. 9), make the same concession.

The right to maintain such an action rests upon the general proposition set forth by this Court in *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 39:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied * * *

This proposition has been broadly applied under the federal securities legislation. In addition to implying private rights of action for violations of the proxy requirements of Section 14(a) of the Securities Exchange Act, the courts have recognized private rights of action for violations of the margin requirements of Section 7, 15 U.S.C. 78g, and the regulations thereunder,⁶ of the requirement of Section 6(b), 15 U.S.C. 78f(b), that stock exchanges adopt disciplinary procedures,⁷ and, most extensively, for violations of the anti-fraud provisions of Section 10(b), 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R.

⁶ It is applied also to authorize injunctive relief. *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210. As to implied rights of action generally, see *Wheeldin v. Wheeler*, 373 U.S. 647, 661-662 (dissenting opinion); Restatement, Torts, Section 286; 2 Loss, *Securities Regulation* (2d ed., 1961) pp. 932-946; Note, 77 Harv. L. Rev. 285. And see *Abou-Rader v. Strohmeier & Arpe Co.*, 243 N.Y. 458, 154 N.E. 309, 3f1, where the court found that "[t]his rule is so general and well established that it is not subject to debate or question * * *."

⁷ See *Remar v. Clayton Securities Corp.*, 81 F. Supp. 1014 (D. Mass.); *Appel v. Levine*, 85 F. Supp. 240 (S.D.N.Y.); *Reader v. Hirsch & Co.*, CCH Fed. Sec. L. Rep. ¶ 91,044 (S.D.N.Y.).

⁸ *Baird v. Franklin*, 141 F. 2d 238 (C.A. 2), certiorari denied, 323 U.S. 737.

240.10b-5.⁹ Implied rights of action have also been recognized for violations of provisions of other federal securities legislation.¹⁰

Section 14(a) of the Securities Exchange Act stemmed from the Congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H. Rep. No. 1383, 73d Cong., 2d Sess., p. 13. It was intended "to control the conditions under

⁹ See *Ellis v. Carter*, 291 F. 2d 270 (C.A. 9); *Matheson v. Armbrust*, 284 F. 2d 670 (C.A. 9), certiorari denied, 365 U.S. 870; *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195 (C.A. 5), certiorari denied, 365 U.S. 814; *Reed v. Riddle Airlines*, 266 F. 2d 314 (C.A. 5); *Fratt v. Robinson*, 203 F. 2d 627 (C.A. 9); *Errian v. Connell*, 236 F. 2d 447 (C.A. 9); *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (C.A. 2); *Slavin v. Germantown Fire Ins. Co.*, 174 F. 2d 799 (C.A. 3); *Speed v. Transamerica Corp.*, 99 F. Supp. 808 (D. Del.), affirmed, 235 F. 2d 369 (C.A. 3); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa.).

¹⁰ Under the Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C. 80a-1, *et seq.*, see *Brown v. Bullock*, 194 F. Supp. 207 (S.D.N.Y.), affirmed, 294 F. 2d 415 (C.A. 2); *Taussig v. Wellington Fund, Inc.*, 187 F. Supp. 179 (D. Del.), affirmed, 313 F. 2d 472 (C.A. 3), certiorari denied, 374 U.S. 806; *Cogan v. Johnston*, 162 F. Supp. 907 (S.D.N.Y.); *Schwartz v. Bowman*, 156 F. Supp. 361 (S.D.N.Y.), appeal dismissed *sub nom. Schwartz v. Eaton*, 264 F. 2d 195 (C.A. 2); *Breswick & Co. v. Briggs*, 136 F. Supp. 301 (S.D.N.Y.); *Brown v. Eastern States Corp.*, 181 F. 2d 26, 28 (C.A. 4), certiorari denied, 340 U.S. 864. But cf. *Brouk v. Managed Funds, Inc.*, 286 F. 2d 901 (C.A. 2), vacated as moot, 369 U.S. 424.

Under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. 79a, *et seq.*, see *Goldstein v. Groesbeck*, 142 F. 2d 422 (C.A. 2), certiorari denied, 323 U.S. 737; *Phillips v. The United Corp.*, 5 S.E.C. Jud. Dec. 445 (S.D.N.Y.).

Under the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. 77a, *et seq.*, see *Thiele v. Shields*, 131 F. Supp. 416 (S.D.N.Y.).

which proxies may be solicited with a view to preventing the recurrence of abuses which * * * [had] frustrated the free exercise of the voting rights of stockholders." *Id.* at 14.¹¹ Although the section makes no explicit reference to a private right of action, its remedial purpose¹² indicates that persons injured by violations thereof may obtain judicial relief.

Petitioner Case urges that the "failure of Congress to provide for such an action must be interpreted as a manifestation of its intention that there should be no such action" (Br. 10) and that "the rule of *expressio unius* * * * completely negate[s] any inference that the Act was intended to create a private civil remedy for violations of Section 14(a)" (Br. 13-14). This contention is, of course, wholly at variance with Case's concession that a private right of action for prospective relief is to be implied from Section 14(a) (see n. 5, *supra*). Further, petitioner's argument would bar the rights of action which have long been recognized under the other similar sections of the federal securities laws (see cases cited, *supra*, pp. 12-13). As the Court noted in *Securities and Exchange Commission v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-351:

[T]he ancient maxim "*expressio unius est exclusio alterius*" * * * [must be] subordinated to the doctrine that courts will construe the

¹¹ It had been noted: "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S. Rep. No. 792, 73d Cong., 2d Sess., p. 12.

¹² Cf. *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180.

details of an act in conformity with its dominating general purpose * * * so as to carry out in particular cases the generally expressed legislative policy.¹³

The individual petitioners (Barr Br. 10; and see Case Br. 18) suggest that the present action is not based upon Section 14(a) insofar as respondent seeks to void the Case-ATC merger. They contend that the

¹³ Petitioner Case relies (Br. 12-13) upon *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, and *Jacobson v. New York, N.H. & H.R. Co.*, 206 F. 2d 153 (C.A. 1), affirmed *per curiam* without discussion of this point, 347 U.S. 909, for its contention that Congress did not intend to create a private right of action for retrospective relief for violations of Section 14(a). However, neither case is persuasive here. The only question in *Nashville Milk* was whether Section 3 of the Robinson-Patman Act was one of the "anti-trust laws" for the violation of which the Clayton Act expressly authorizes a private suit for treble damages; this Court held that it was not. *Jacobson* was essentially an action for negligence. The court of appeals, following a long line of prior decisions (206 F. 2d at 157), held that a violation of the federal Safety Appliance Acts did not create a federal cause of action in behalf of a railroad passenger allegedly injured thereby, although the violation might well be considered in determining whether negligence under State law had been shown. The court noted that the Federal Employers' Liability Act had specifically created a right of action for railroad employees injured while employed in interstate commerce and that in such an action violation of the federal Safety Appliance Acts is treated as negligence *per se*. It held that the federal common law principle expressed in *Texas & Pacific Ry. v. Rigsby*, *supra*, that implied liability arises from damage to one of the class for whose benefit the statute is enacted, should not be extended to personal injury actions except for members of a class for whom express provision had been made. No such limitations on the implied liability doctrine have ever been suggested with respect to investors, such as the respondent here, who constitute the class for whose benefit the federal securities statutes were enacted.

merger can be voided only if it was a fraudulent or non-beneficial merger, and that the answer to that question is not dependent upon the allegedly invalid proxy material. Petitioners thus assert that there is no causal relationship between the proxy violations and the merger, or that the respondent may not be able to show that he was injured or that the violations are the cause of the injury. Those are questions of fact relating to relief and are to be resolved at the trial; they do not go to the jurisdiction of the court to entertain the action. The fact that they may ultimately be resolved against respondent does not deprive him of the right to assert a claim under Section 14(a). Cf. *Bell v. Hood*, 71 F. Supp. 813 (S.D. Cal.).

B. FEDERAL JURISDICTION ENCOMPASSES DERIVATIVE AS WELL AS DIRECT ACTIONS FOR INJURIES RESULTING FROM VIOLATIONS OF SECTION 14(a)

Citing *Howard v. Furst*, 238 F. 2d 790 (C.A. 2), certiorari denied, 353 U.S. 937, petitioners argue (Case Br. 14; Barr Br. 9) that respondent's action is derivative in nature, seeking recovery for injuries to the corporation, and that no such private action may be maintained for an alleged violation of Section 14(a).¹⁴

¹⁴ The district court declined to dismiss Count Two of the complaint insofar as it sought a declaratory judgment not only that the proxy statement was false but also that the merger and all agreements pursuant thereto were void. The latter allegations are derivative in nature. Petitioners did not appeal from the court's refusal to dismiss this portion of the complaint. On the contrary, they urged that the order be affirmed in its entirety (Pet. Br. in Ct. of App., p. 41). In so doing, they necessarily accepted the court's recognition of the availability of a derivative action for violation of the proxy rules. Under the circumstances, this Court need not consider the question. Cf. *United States v. American Railway Express Co.*, 265 U.S. 425, 435.

We do not dispute the characterization of the action as derivative, at least insofar as it seeks damages and rescission. However, it makes no difference whether respondent's suit is derivative in nature or direct, for a private right of action exists in both cases.

The objective of proxy solicitation is to authorize corporate action, and the purpose of Section 14(a) and the proxy rules is to prevent management or others from obtaining such authorization by means of deceptive or otherwise inadequate disclosure. A violation of the statute may injure stockholders directly, for example, by bringing about a release of their preemptive rights, or derivatively through injury to the corporation which they own. The statutory purpose obviously justifies a remedy for all such injuries. Accordingly, the principles which have led the courts to imply liability apply with equal force whether the private action is brought by the stockholder for his direct injuries or in a derivative capacity for injuries sustained by the corporation.

In *Howard v. Furst, supra*, the court of appeals held otherwise. It reasoned that a derivative action is one to enforce a right of a corporation and that, since Section 14(a) regulates solicitation of proxies from stockholders "for the protection of investors," it does not create any rights in the corporation as distinct from its individual stockholders.¹⁵ However,

¹⁵ The court may have been influenced not so much by this conceptual reasoning as by a belief that, since the defendant directors there owned more than 60 percent of the stock, proxy solicitation was something of a formality having little relation to the essential issues.

"the protection of investors" requires redress not only against conduct which injures them directly without affecting their underlying equity in the corporation, but also against conduct which results in injury to their interest in the corporation. In each case the injury is to the investors and in each case they are entitled to redress as part of the protection afforded under Section 14(a). When Congress provided in Section 14(a) for the regulation of the proxy mechanism "in the public interest," it obviously intended that the words of the statute be read broadly in accordance with its remedial purpose and not in the limited and technical fashion in which the court approached the proxy provision in *Howard v. Furst*, *supra*.

The distinction drawn in *Howard v. Furst* was not accepted in *Hoppe v. Mountain States Securities Corp.*, 282 F. 2d 195, 201-202 (C.A. 5), certiorari denied, 365 U.S. 814. There the court held that an issuing corporation could recover under Section 10(b) of the Act and Rule 10b-5 thereunder for fraud in the issue and sale of its securities. In so doing it characterized the argument that an issuing corporation is not an "investor" for whose protection the rule was adopted, as an "artificial application of the concept that violation of a legislative standard gives those intended to be protected a private right of action provided the injury sustained is other than that suffered by the public generally." It went on to explain that the "broad purpose" of the securities laws was to prevent fraudulent schemes and other evils in the

securities field and that protection of an issuing corporation from such frauds was within the "public interest" standard of the Act. Similarly, it is in the public interest that stockholders be permitted to redress injuries resulting from violation of the proxy rules, even though they seek such redress derivatively on behalf of their corporation.

The distinction between a "derivative" and an "individual" cause of action is unenlightening in the context of proxy solicitation. As was pointed out in *Dann v. Studebaker-Packard Corporation*, 288 F. 2d 201 (C.A. 6), with reference to an implied cause of action under the proxy rules, the determination whether this is a derivative or an individual action depends upon whether emphasis is placed on the "right violated" which is individual or upon the "damage which resulted" which that court classified as derivative. The court characterized analysis in terms of this distinction between "derivative" and "individual" rights of action as "* * * merely legal formalisms in which the Court elects to clothe its choice of the underlying policy considerations upon which the real basis for decision must rest" (*id.* at 211). The injury suffered by a stockholder as a result of corporate action consummated pursuant to a misleading proxy solicitation is almost invariably a result of injury suffered by the corporation, rather than damage inflicted directly upon him. Indeed, any damage he suffers results not so much from the fact that he was deceived into giving his own proxy, but rather

from the fact that a majority of the other stockholders were similarly deceived.¹⁶ Consequently the "underlying policy considerations" here involved are really whether or not stockholders so injured may obtain a meaningful remedy. To this we now turn.

II

IN A PRIVATE SUIT ALLEGING INJURY FROM VIOLATIONS OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT, A FEDERAL DISTRICT COURT HAS JURISDICTION UNDER SECTION 27 OF THE ACT TO GRANT WHATEVER RELIEF MAY BE APPROPRIATE

Both courts below and, indeed, the petitioners recognized that a private right of action may arise from violations of the proxy rules. The real controversy was whether federal jurisdiction in such a case is limited to claims for declaratory relief. The court of appeals properly held that there is federal jurisdiction under Section 27 "to award damages or such other retrospective relief to the plaintiff as the merits of the controversy may require" (R. 234). No other ruling would be consistent with the broad grant of jurisdiction in Section 27 of the Act over "all suits in equity and actions at law brought to enforce any liability or duty created [thereby]" or with the decisions of this Court.

Thus, the Court stated the governing principle in

¹⁶ Even if a particular stockholder is not deceived and votes against a proposal, his injury will be the same if a majority of his fellow stockholders are misled into authorizing injurious action.

Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 176:

When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. * * *

Accord: *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, *supra*, 323 U.S. at 213; *Deitrick v. Greaney*, 309 U.S. 190, 201. *Bell v. Hood*, 327 U.S. 678, 684, made clear that the federal courts have the power to fashion whatever relief may be necessary in the particular circumstances: "[I]t has been the rule from the beginning" that "where federally protected rights have been invaded * * * courts will be alert to adjust their remedies so as to grant the necessary relief." In our view, these cases are dispositive of the issue presented here.

Petitioner Case suggests that *Bell v. Hood* is inapplicable to the present case because it involved "a 'general grant of jurisdiction' to the courts to enforce" a federal statute, whereas Section 27 of the Exchange Act is "merely a designation of the forum" (Case Br. 15). Such a restrictive interpretation of Section 27, however, is contrary to the views expressed in *Deckert v. Independence Shares Corp.*, 311 U.S. 282, with respect to a comparable provision of the Securities Act of 1933. The question there was whether the Securities Act "authorizes purchasers of securities to maintain a suit in equity

to rescind a fraudulent sale and secure restitution of the consideration paid, and to enforce the right to restitution against a third party where the vendor is insolvent and the third party has assets in its possession belonging to the vendor." 311 U.S. at 284. Relying upon Section 22(a) of the Securities Act, 15 U.S.C. 77v(a) which, like Section 27 of the Exchange Act, gives federal courts jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created" by the Act and rules thereunder, the Court held that there was jurisdiction to grant the relief requested. 311 U.S. at 290. With respect to Section 22(a), the Court stated (311 U.S. at 288):

The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. * * *

The fact that the *Deckert* case involved a statutory provision which in terms created liability to private parties, while the instant claims are based upon an implied liability, provides no valid distinction insofar as the court's jurisdiction to grant relief is concerned. In both cases the liability arises under federal law, and the statutory grant of federal jurisdiction to enforce any liability is identical and unrestricted.

The holding in *Bell v. Hood*, 327 U.S. 678, 684, that "federal courts may use any available remedy to make good the wrong done" has been applied in

many situations and the availability of the remedy has never been dependent upon its specification in the statute involved. Thus, in *Porter v. Warner Holding Co.*, 328 U.S. 395, the Court held that the absence of a specific statutory provision permitting the courts to order restitution of rents collected in excess of the permissible maximum did not deprive a district court of its equitable jurisdiction to order such restitution in an action by the Price Administrator to enjoin violations of the Emergency Price Control Act of 1942. The Court stated (*id.* at 398) that only with the power to grant "whatever * * * relief may be necessary" under the circumstances * * * can equity do complete rather than truncated justice." It added: "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Similarly, where the Secretary of Labor sued to enjoin violations of the Fair Labor Standards Act of 1938, it was held that a federal district court had jurisdiction to order reimbursement for losses of wages caused by a violation of the Act, even though there was no specific provision in the statute contemplating such relief. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288. The Court stated (*id.* at 291-292): "* * * When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." See also *Schine Chain*

Theatres, Inc. v. United States, 334 U.S. 110, where no jurisdictional objection was found, in an action based upon Sections 1 and 2 of the Sherman Act, to a district court order requiring divestiture of certain properties, notwithstanding the silence of the Act with respect to such a remedy. The Court noted (*id.* at 128) that divestiture was "an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project."

The principles recognized in the foregoing cases had been applied in actions based upon violations of the proxy rules long before the decision of the court below." Indeed, whether the action be brought by the Commission or by private parties, it is only through application of such principles that the "reasonably complete and effective" control and regulation contemplated by Section 2 of the Act (15 U.S.C. 78b) will be afforded. Private enforcement of the proxy rules provides an important supplement to the necessarily limited enforcement activities of the Commission. In our view, the possibility of civil damages or other relief serves as an effective deterrent against

¹⁷ See *Securities and Exchange Commission v. Transamerica Corp.*, 163 F. 2d 511, 518 (C.A. 3), certiorari denied, 332 U.S. 847; *Mack v. Mishkin*, 172 F. Supp. 885, 889 (S.D. N.Y.). For applications of these principles in other cases arising under the federal securities laws see, e.g., *Aldred Investment Trust v. Securities and Exchange Commission*, 151 F. 2d 254, 261 (C.A. 1), certiorari denied, 326 U.S. 795; *Securities and Exchange Commission v. Los Angeles Trust Deed & Mortgage Exchange*, 186 F. Supp. 830, 838-839 (S.D. Cal.), modified, 285 F. 2d 162, 182 (C.A. 9).

proxy violations and may be particularly helpful in instances where the facts regarding the violation do not become apparent until after the proxies have been voted and where criminal sanctions do not appear to be indicated. The Commission's administrative function under the proxy rules is limited to examination of proxy solicitation material prior to its circulation. See Rule 14a-6, 17 C.F.R. 240.14a-6. The Commission examines over 2,000 proxy statements a year," and Rule 14a-6 contemplates that the Commission's examination will have been completed within a ten-day period so that the solicitor may proceed to distribute the material. Ordinarily the Commission cannot make an independent investigation into the facts set forth in solicitation material and must take all statements contained therein at their face value unless they are inconsistent with prior material filed with the Commission. Hence, cases may well arise where proxy solicitation material appears proper on its face but may prove to be misleading on the basis of facts unknown to the Commission."

¹⁸ See, e.g., 28 SEC Ann. Rep. 58; 27 SEC Ann. Rep. 71.

¹⁹ On the facts alleged in respondent's complaint, the instant case presents a good example of this type of situation. The alleged misleading nature of the proxy material resulted in part from a failure to disclose claimed unlawful market manipulations of the stock of ATC, the company with which Case was to be merged (R. 185, 192). Until a violation of the anti-manipulative provisions of the Securities Exchange Act became known following the merger, violations of the proxy rules in this respect would not have been apparent.

Petitioner Case refers to the fact that the "[p]roxy material describing the proposed merger was not challenged by the Securities & Exchange Commission" (Case Br. 4). Examination of

There is no merit to petitioners' argument that retrospective relief—rescission—is “so obviously completely determinable and remediable under non-federally based common law” that the federal courts have no jurisdiction to award such remedies even where appropriate (Barr Br. 9; Case Br. 19-20).” Essentially, petitioners' contention is the one accepted by the Sixth Circuit in *Dann v. Studebaker-Packard Corp.*, 288 F. 2d 201,” that the “preponderance of questions of state law which would have to be interpreted and applied in order to grant the relief sought * * * is so great that the federal question involved * * * is really negligible in comparison” (288 F. 2d at 214).” But overriding federal law may re-

such material by the staff of the Commission and its failure to object thereto is not to be regarded as approval and should have no effect upon a subsequent private suit based upon the material. See Section 26 of the Act, 15 U.S.C. 78z; *Subin v. Goldsmith*, 224 F. 2d 753, 767, 774 (C.A. 2); *Securities and Exchange Commission v. Henwood*, CCH Fed. Sec. L. Rep. ¶ 91,125, at p. 93,713-7, modified on other grounds, 298 F. 2d 641 (C.A. 9), certiorari denied, 371 U.S. 814; *Union Pacific R.R. Co. v. Chicago and North Western Ry. Co.* (N.D. Ill., No. 63-C-2051, February 18, 1964).

²⁰ There is, of course, no issue here as to the appropriate form of relief in this case. Questions whether damages should be awarded to respondent or whether the Case-ATC merger should be overturned or declared void have not yet been reached. Indeed, it has not been determined whether respondent is entitled to any relief.

²¹ This holding has been the subject of criticism. See 2 Loss, *Securities Regulation* (2d ed., 1961) Supp., 1962, pp. 20-23; 75 Harv. L. Rev. 637; 62 Col. L. Rev. 375; 1962 Duke L. J. 151, 161; 9 U.C.L.A. L. Rev. 232. Compare 112 U. Pa. L. Rev. 456 (comment on the instant case).

²² The court stated that were it to determine the effects of invalid proxies it would be faced with such questions of state law

quire redress irrespective of the provisions of State corporation law. In determining the appropriateness of such relief, "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers v. Lincoln Mills*, 353 U.S.

as "the participating quorum necessary to transact the business under consideration and thereby to make the election a valid one; the voting majority necessary to determine the issue voted upon; does this mean a majority of all stockholders or merely a majority of the participating quorum; what is the scope and effect of the *de facto* doctrine as affecting proxies declared invalid under federal law?" 288 F. 2d at 214.

Petitioner Case attempts to provide additional reasons why federal jurisdiction should not encompass the type of relief sought in the present case by suggesting various problems that would result from the "unwarranted extension of Federal jurisdiction" (Case Br. 10) over matters traditionally governed by State law (Case Br. 19-25). We have already seen, however, that petitioner does "not question the private right of shareholders under the Act, in addition to the rights of the Commission, to seek prospective relief of injunction * * *" where a materially false and misleading proxy statement has been used (Case Br. 10). Nor does petitioner seem to quarrel with the long line of cases according retrospective relief to private parties for violations of Section 10(b) of the Act and Rule 10b-5 thereunder (see n. 9, *supra*). Nevertheless, substantially all of the difficulties petitioner foresees would be presented by application of the foregoing propositions. For example, the problems suggested (Case Br. 21) with respect to the applicable statute of limitations and the state security-for-expenses statutes have already been determined in actions under Rule 10b-5. See, e.g., *Errion v. Connell*, 236 F. 2d 447, 455 (C.A. 9) (statute of limitations); *McClure v. Borne Chemical Co., Inc.*, 292 F. 2d 824 (C.A. 3), certiorari denied, 368 U.S. 939 (security for expenses). As to the interference with the internal affairs of corporations (Case Br. 10), there would seem to be little difference in the extent of interference between an action to postpone a corporate meeting and require resolicitation of proxies (see, e.g., *Securities and Exchange Commission v. Transamerica*

448, 457; *Union Pacific R. Co. v. Chicago and North Western Ry. Co.* (N.D. Ill., No. 63-C-2051, February 18, 1964). The fact that questions of State law might have to be decided, however, in determining the relief to be awarded to redress injuries caused by the invalid proxies in no sense establishes that the right to redress is a State rather than a federal right. On the contrary, the principles stated in *Bell v. Hood*, *Sola Electric Co.*, and *Deckert*, establish that the federal right implied from Section 14(a) is a right to all appropriate relief.

Gully v. First National Bank, 299 U.S. 109, on which petitioners and the Sixth Circuit in *Dann* rely, is not to the contrary. The issue there was whether an action brought by a State tax collector to enforce an assessment of a state tax against a national bank was a suit arising "under the Constitution or laws of the United States," within the meaning of the Judicial Code. In holding that the case did not so arise, the Court determined that the plaintiff's cause of action was based wholly on State law and that the federal statute relied upon (the statute authorizing States to tax national banks) did not confer the right, but merely withdrew a possible defense, and that it was not apparent that there was any actual controversy concerning the federal law. This Court concluded that "[t]he most one can say is that a question of federal law is lurking in the background." 299 U.S.

Corp., 67 F. Supp. 326 (D. Del.), modified and affirmed, 163 F. 2d 511 (C.A. 3), certiorari denied, 332 U.S. 847), and one seeking damages or other relief after the proxies obtained in violation of the rules have been voted.

at 117. In the present case, however, the essence of the claims are the alleged violations of the federal proxy rules, and as in *Bell v. Hood, supra*, 327 U.S. at 683, they "form * * * the sole basis of the relief sought." Here, the most petitioners could say is that there are questions of State law lurking in the background.

Even if questions of State law must be decided in order to determine the specific results which should follow from a violation of federal law, this does not provide a reason to refuse to determine these results. See, e.g., *United Fuel Gas Co. v. R. R. Commission*, 278 U.S. 300, 307; *Risty v. Chicago, Rock Island & Pacific Ry. Co.*, 270 U.S. 378, 387; *Osborn v. Bank of the United States*, 9 Wheat. 738. In *Osborn*, where it was contended that the action did not arise under a law of the United States because several questions might have involved local law, Chief Justice Marshall stated (9 Wheat. at 819-820):

If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing.

If federal jurisdiction were limited to the granting of declaratory relief, investors would often have to go into the courts of the State, where the transaction for which the proxies were solicited had been consummated, in order to obtain meaningful redress for

violations of Section 14(a) of the Securities Exchange Act. If the law of a particular State should attach no substantive consequences to the use of a misleading proxy statement, the result might well be to leave the investors without any remedy. Efforts of the State court to fashion a remedy to fill the void might be met with the argument that this is contrary to Section 27 which confers exclusive jurisdiction of violations of the Act on the federal courts."

Even where State law affords a remedy, there would be no certainty that the injured investors could obtain redress. Whether a plaintiff would be forced to prosecute separate suits, as contemplated in *Dann*, or could assert jurisdiction on the basis of diversity of citizenship, application of restrictive State statutes such as the security-for-expenses statute involved in the present case²⁴ might well leave him with an empty declaratory judgment. Without the benefit of the broad venue and nationwide service of process provisions of Section 27 of the Act, a plaintiff who was "successful" in the federal court could find it impossible to bring before a State court all parties necessary to the complete relief.²⁵ Indeed, the very "horrors of split, or piecemeal, litigation" referred to in *Dann* (288 F. 2d at 214) could alone discourage the bringing of

²⁴ Cf. *Mekrut v. Gould*, 188 N.Y.S. 2d 6, 9 (Sup. Ct., N.Y. County); *American Distilling Co. v. Brown*, 51 N.Y.S. 2d 614, 616-617 (Sup. Ct., N.Y. County); *Standard Power & Light Corp. v. Investment Associates, Inc.*, 51 A. 2d 572, 579 (Del. Sup. Ct.).

²⁵ Cf. *Chabot v. Empire Trust Co.*, 301 F. 2d 458, 461 (C.A. 2); Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 Calif. L. Rev. 123.

²⁶ Cf. *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195, 198 (C.A. 5), certiorari denied, 365 U.S. 814; *Phillips v. The United Corp.*, 5 S.E.C. Jud. Dec. 415, 471-472 (S.D. N.Y.).

private actions for violations of Section 14(a) once the proxies had been used to accomplish their purpose.

Petitioners place great stress on the allegedly extreme and disruptive consequences which would result if federal jurisdiction exists to order rescission of a merger (Case Br. 23-25).²⁶ Although we believe that federal courts have power to grant this remedy if they determine that this is necessary,²⁷ we believe that other available relief may normally be more appropriate. This would include damages or readjustment of the terms of the merger to eliminate inequities in the allocation of securities among the participants. Respondent alleges that such inequities existed in this case and, in violation of the proxy rules, were concealed. On the other hand, rescission of a merger might be appropriate, for example, where a corporation, wholly owned by violators of the proxy rules, has merged with a publicly owned company or where a merger is the product of an illegal conspiracy between the corporate managements involved and there are no intervening equities. In this case we are concerned only with the existence of federal jurisdiction and not with the determination of the appropriate remedy, which must await trial on the merits.

²⁶ Petitioners presumably do not question the jurisdiction of State courts to upset mergers where State law is violated. It does not appear how federal jurisdiction to upset a merger would be any more disruptive than State jurisdiction to do so.

²⁷ Compare *The Chicago Junction Case*, 264 U.S. 258, where this Court held that an action lay to set aside a completed acquisition by the New York Central Lines of the stock of the Chicago River and Indiana Railroad, as well as a lease entered into by the latter company. There it was alleged that the order of the Interstate Commerce Commission authorizing these transactions had not been supported by evidence.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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MARCH 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

J. I. CASE COMPANY, HARRY G. BARR, JOHN T. BROWN,
L. R. CLAUSEN, WM. J. GREDE, E. P. HAMILTON,
WM. B. PETERS, and MARC B. ROJTMAN,

Petitioners,

vs.

CARL H. BORAK, for and on behalf of himself and all of the
other common stockholders of J. I. Case Company who are
similarly situated to him,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF OF J. I. CASE COMPANY

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ARGUMENT.

**I. THE DEFENDANTS MAKE NO CONCESSIONS AS
TO ANY REMEDIES IMPLIED BY SECTION 14(a).**

The Plaintiff-Respondent asserts that we have conceded
the existence of a private right to prospective relief for

violations of Section 14(a) of the Securities Exchange Act. From this he concludes that it is reasonable also to imply a private action for retrospective relief. The Plaintiff's position rests upon the following language from our brief, at page 10:

"We do not question the private right of shareholders under the Act, in addition to the rights of the Commission, to seek prospective relief of injunction in such circumstances."

Perhaps we should have used the word "argue" instead of "question". We do not believe that this language requires interpretation as a concession of the existence of a private right of action for prospective relief from threatened violations of Section 14(a) and certainly such was not intended. Furthermore, the reasons which might justify a court, in exercise of its general equity jurisdiction, in granting injunctive relief against a threatened unlawful act clearly do not necessarily justify the creation of a new remedy for retrospective relief. In any event, the Case Company wishes not to embark on such an inquiry or to make any concession that there is any prospective or retrospective remedy implied in the Section. The point is simply that the existence or non-existence of a private action for prospective relief is not an issue raised by the facts alleged in this case.

II. THE ACT NEITHER CREATES NOR CONTEMPLATES PRIVATE ACTIONS FOR VIOLATIONS OF SECTION 14(a).

A. No Such Private Actions are Expressly Created.

Neither the brief of the Plaintiff nor that of the Securities and Exchange Commission fairly faces the fact that Congress spelled out definite remedies with provisions for security for expenses and limitations periods in each of

Sections 9(e), 16(b) and 18(a), but provided no private remedy for a violation of Section 14(a). In fact, the remedies created by Section 18(a) run in favor of persons injured by the very same violations of the Act alleged by the Plaintiff, i.e. the use of a false or misleading proxy statement. Section 18(a) expressly and unambiguously creates an action in favor of persons who are injured by purchasing or selling a security in reliance upon a false or misleading statement. Because no purchase or sale is involved here and Section 18(a) is therefore not applicable, the Plaintiff seeks to force a construction of Section 14(a) as though it contained the same language creating a private remedy as Section 18(a), but without the conditions imposed by Section 18(a). When Congress omitted remedies for persons who, like the Plaintiff, did not purchase or sell, is it not clear that Congress did not intend any remedy in that situation?

Sections 9(e) and 18(a) expressly provide that the Plaintiff may be required to furnish an undertaking for expenses, and 9(e), 16(b), and 18(a) all provide specific limitation periods prescribing the time in which actions may be brought. The Plaintiff and the Commission would have the Court believe that where Congress did not provide a remedy, as in Section 14(a), Congress intended that the courts should create such remedies as *they* feel are appropriate, and without the safeguards of security for expenses or limitation periods which apply to expressly created actions. That is, Congress, when it did not provide a remedy, intended to confer by implication a much broader and more sweeping remedy than when it specifically spelled one out. We suggest that this contention ascribes to Congress a most bizarre piece of legislative draftsmanship; of course Congress intended no such construction. The contention of the Plaintiff and the Com-

mission hardly seems to accord to Congress the courtesy and respect we owe to the intelligence of the legislative branch of the Government.

Additionally, both briefs seem to suggest that seeking to find Congressional intent from the language used in a statute is just old-fogyish, and that the modern approach is for courts to determine the dominating purpose of an act and then insert what they believe would be socially desirable provisions in the statute—by implication. This approach certainly should be applied with the greatest of caution lest we get lost in an uncharted sea of decision by economic views rather than by application of time-honored principles, such as the "*expressio unius*" principle, to determine legislative intent.

B. Section 27 Does Not Authorize or Contemplate Any Actions Which Are Not Expressly Created By the Other Sections of the Act.

The Plaintiff attempts to overcome the fact that Congress did not expressly create an action in his favor by contending that Section 27 (15 U.S.C. §78aa) authorizes actions other than those expressly created in the Act. The Plaintiff's total argument is that

"The plain language of Section 27 is the best refutation of [the] absurd argument [that §27 is *not* a general grant of jurisdiction in the sense of *Bell v. Hood*]."

Plaintiff's Brief p. 35.

Section 27 is *not* a general grant of jurisdiction in the sense that Congress said to the federal district courts, "here is the Act, you are hereby given *carte blanche* to enforce it." Section 27 can be termed a general grant of jurisdiction only in the sense that Congress gave exclusive jurisdiction to the district courts of all actions ex-

pressly created or authorized by the other Sections of the Act. That is, it designates where these actions must be brought. However, no talismanic benefits are to be derived from invoking the phrase "general grant of jurisdiction to enforce the statute" (*Bell v. Hood*, 327 U.S. 368 (1946) discussed at p. 23 of Plaintiff's Brief). The germane inquiry is simply whether as a matter of statutory interpretation, Section 27 creates or authorizes any private actions which are not expressly created elsewhere in the Act.

Section 27 speaks of "violations of this title, or the rules and regulations thereunder", "suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder", "criminal proceedings", and "suits to enjoin any violation". There is no language in Section 27 which refers to any actions other than the criminal actions, private actions, and actions to enforce or enjoin by the Commission which are expressly created or authorized by *other* sections of the Act. Furthermore, there is no indication whatsoever that in using this language Congress contemplated creating any new actions other than those expressly created elsewhere. Here again, the Plaintiff and the Commission would have the courts rewrite Section 27 to provide "In addition to those private actions created or authorized by other Sections of this title, any person alleging any injury by a violation of any other provision of this title may also bring an action hereunder for damages or suit for appropriate equitable relief". Congress intended no such thing.

C. The Vast Extent of the Proposed Expansion of Section 14(a) by Implication.

Throughout the briefs of the Plaintiff and of the Solicitor General on behalf of the Securities and Exchange Commission are found a great variety of provisions which

they contend should be incorporated by implication into Section 14. For instance, the Plaintiff argues that no state law provisions with respect to security for expenses or the like are to be applicable. They also argue that the power given to the federal district courts is completely without limit with respect either to the granting of any money relief or to the rearrangement and readjustment of the merger terms. (See Commission Brief, p. 31). As a demonstration of how far their argument goes, we have endeavored to put into writing the proposed additions to Section 14 which Plaintiff and the Commission directly or indirectly argue are already there by implication. The sub-sections they advocate might read as follows:

"14(c) Any stockholder who alleges that in a merger proceeding involving his company, a proxy was used in contravention of the rules and regulations of the Commission as provided in (a) above shall be entitled to bring an action under Section 27 of this title.¹ In such action provisions of state law, such as requirements for securities for costs, statutes of limitations or appraisal statutes, even though part of the state merger law under which the merger was consummated, shall not apply to the plaintiff, nor shall the court require security for costs to be posted by any plaintiff unless expressly provided for by federal statute hereinafter enacted.²

"14(d) If after a trial the court shall find that any proxies were utilized pursuant to a proxy statement which was in any respect in violation of the rules and regulations, as specified above, such as by omission, whether intentional or inadvertent, to state a material fact, then such proxies shall be declared void as is

¹ See Plaintiff's Brief, p. 20, *et seq.*

² See Plaintiff's Brief, p. 43, *et seq.*

provided in Section 29, and the agreement for merger and the merger consummated pursuant thereto shall likewise be declared void.¹

"14(e) In the event of such finding as set forth in (d) above, the court shall be empowered after due hearing to award money damages against the corporations concerned, its defendant directors or other defendant persons payable to the plaintiff and to such other members of his class as the court may adjudge and shall impose costs as the court may deem equitable.²

"14(f) The court may also require the corporation to issue new or additional securities to the plaintiff and to members of his class as the court may deem just, and in general the court may make other *readjustment of the terms of the merger*³ as the court may determine to be just and equitable."

We believe that while the above may seem extreme, it is a fair presentation of the positions directly or implicitly taken by the Plaintiff and the Commission in their briefs as to the implied scope of Section 14.

It also follows from the positions taken by the Plaintiff and the Commission that in making "readjustments of the terms of the merger", the district courts would inevitably have to consider and balance out, in addition to the equities of all the different interested persons, the financial and economic situation of the merging corpora-

¹ See Plaintiff's Third Amended and Supplemental Complaint, R. 179 at 197.

² See Plaintiff's Third Amended and Supplemental Complaint, R. 179 at 197.

³ The italicized clause is the recommendation in the Commission brief, p. 31. See also Plaintiff's Third Amended and Supplemental Complaint, R. 179 at 197.

tions as of the time of the merger, the changes in the resulting merged corporation up to the time of the proposed "readjustment," and the changes that might, in the court's opinion, take place in the future, up to the final issuance of securities contemplated by the "readjustment." This would require of the federal District courts almost superhuman qualities of judgment and financial and economic wisdom and foresight, contrary to the traditional reluctance of equity to become embroiled in the affairs of running a business.

We further suggest that if an amendment to Section 14 along the above lines were proposed by the Commission to Congress the appropriate committees of the Senate and House would give the proposal short shrift.

III. THE BRIEFS OF THE PLAINTIFF AND THE COMMISSION UNDERSTATE THE REMEDIES NOW AVAILABLE FOR THE PROTECTION OF A DEFRAUDED INVESTOR.

Both briefs seem to assume that a new retrospective private remedy under Section 14 is needed to supplement or replace the present federal punitive remedies and the state punitive and civil remedies for fraud. Each brief (Plaintiff's Brief, p. 26; Commission Brief, p. 30) points out that the time honored state remedies for fraud may sometimes present venue problems and that lack of uniformity may develop throughout the nation.¹

¹ We suggest that it may take fifty years and a dozen or two appeals to this Court before the various district and circuit courts of appeal in our federal system will achieve full uniformity in solving the multitude of problems which will be raised under Section 14 if its doors are opened as widely as the Plaintiff and the Commission here seek.

In advocating the creation of more remedies, both briefs emphasize only the state court actions for fraud and completely ignore the existence of an important state court remedy which the Plaintiff enjoyed in Wisconsin. This remedy is also found in the merger laws of virtually all the states. We refer to the appraisal statute, Wis. Stats. 180.69 (see Case Brief 40). Under this law, all the Plaintiff had to do if he did not like the proposed merger was to make a written objection to it, and if no settlement was reached, he could have petitioned the court to appraise his stock at the fair value as of just before the merger, and the company would then have been required to buy his stock from him at that price. What could be simpler and what could be fairer? Why, with such a simple and efficacious state civil remedy available to the dissatisfied stockholder, as well as the federal punitive remedies and the state punitive and civil remedies for fraud, should we struggle to cudgel up by implication a new federal private remedy which would have the effect of unsettling and disrupting corporate structures pending the ordeal of long litigation?

The Solicitor General's brief argues particularly that the Commission feels the need for a private retrospective remedy and that therefore this court should obligingly seek to supply it in the statute by implication. This approach we challenge. In the first place this is an argument better addressed to Congress for amending the Act than to a court. While it is, of course, true that more and higher penalties may tighten enforcement, as no doubt would life terms in jail for a violation, it must be recognized that beyond a point, policing of proxy statements becomes self-defeating: The opening of the door to strike suits brought by any stockholder in every merger where companies listed on an exchange are involved will certainly have most untoward consequences.

The Commission might well be reminded that its responsibility does not begin and end with proxy statements, but that its fundamental objective is to protect the investor. It does not further this protection by urging a tightening of its proxy rules enforcement where the result will subject every merger of every company whose shares are listed on an exchange to easy attack in a strike case brought by a holder of a minor stock interest in the cloak of a class suit. As we suggested in our main brief, no merger under this wide open plan may be regarded as accomplished until all strike suits have first been disposed of. It would seem inevitable that the stockholders of such companies will be plagued with burdensome expense, uncertainty, and delays as a result of the reduced utility of the proxy device, and that the officers' and directors' attention will be diverted from their business into a difficult and continuing study of which is the cheaper and better way to get rid of a strike suit, namely, by litigating it over the years or by buying it off.

IV. THE APPLICABILITY OF THE WISCONSIN STATE SECURITY FOR EXPENSE STATUTE (POINT II OF PETITIONER'S BRIEF) IS NOT ONLY INHERENT IN THE QUESTION PRECISELY AS WORDED IN THE PETITION FOR CERTIORARI BUT ALSO IS A "SUBSIDIARY QUESTION FAIRLY COMPRISED" IN THE PETITION.

The Plaintiff has attempted to limit the scope of the question presented to this Court by alleging that the question of the applicability of the Wisconsin Security for Expenses statute was not properly raised in the Petition for a Writ of Certiorari. This narrow interpretation of the Petition is unwarranted.

Supreme Court Rule 23(1)(c), which is relied upon by the Plaintiff states that the Petition for a Writ of Certiorari shall contain:

"The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the Court."

The question as stated in the petition is whether a federal cause of action for rescission or damages is created by the Securities Exchange Act. This question necessarily subsumes the question of the scope and nature of such cause of action if this Court decides that one exists. The Seventh Circuit did not simply hold that a federal action exists, it held that a federal action exists to which the state statute is inapplicable. The cause of action, if any, cannot exist *in vacuo* under our federal system:

"When federal law, instead of simply regulating the exercise of state authority, turns to take up itself the task of affirmative governance of private activity, it might be supposed that state law would cease to play a significant part * * save only at the periphery marking the outer bounds of federal power. Precisely the contrary is true. It is in this sphere that the essentially incomplete and interstitial nature of federal law is most conspicuously revealed." Hart, "The Relations between State and Federal Law", 54 Colum. L. Rev. 489, 525 (1954).

The applicability of state law to a cause of action created by Federal statute must always be decided where Congress has not specifically pre-empted the field or specifically incorporated state law. As stated by Mr. Justice Jackson

in *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153-154 (1944):

"Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent. * * *. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation."

The relevance of the laws of the states is Congressionally recognized in the Rules of Decision Act, 28 U.S.C. § 1652 (1948).

In the analogous question of the application of state statutes of limitations to federally created causes of action where no federal time bar has been provided by Congress, the law is clear. Ever since this Court's decision in *Campbell v. Haverhill*, 155 U.S. 610 (1895) it has been settled that where Congress is silent as to time limitations for bringing an action, the statute of limitations of the state will be applied by the federal courts. Note, *Federal Statutes Without Limitations Provisions*, 53 Colum. L. Rev. 68 (1953). Similarly, where a state statute includes a limitation as to providing security for expenses the federal judiciary should look to state law unless Congress has indicated a contrary intent.

The Petition for a Writ of Certiorari clearly incorporates not only the question whether a cause of action exists under Section 14(a), but also the question of state limitation upon such cause of action. Thus, the Statement section deals with conflicting decisions of the District and Circuit Courts as to the applicability of the Wisconsin

Security for Expenses statute. Indeed, page 4 of the Statement, when describing the decision of the Circuit Court, states that that Court held:

"... that Count 2 stated a *cause of action* arising under federal law to which the state security for expense statute did not apply and that the district court could award damages or other retrospective relief thereunder." (Emphasis added).

Further, the Reasons for Granting the Writ portion of the brief is divided into two parts. The first of these (Petition pages 8-11) addresses itself to the conflict of decisions between Courts of Appeals concerning the existence or non-existence of a federal cause of action. The second section (Petition pages 11-13) deals with the conflict of decisions on the question of the application of state law to such a cause of action in the event one is found to lie. Thus, the first sentence in the second Reason for Granting the Writ is as follows:

"If it is determined that, absent a supporting legislative history and clear and unambiguous statutory authority, Congress did intend or the federal courts will recognize a private action for alleged violations of Section 14(a) of the Act, *it then becomes important to determine the limitations, if any, upon the relief available under the Act.*" (Petition page 11, Emphasis added).

The second Reason for Granting the Writ goes on to say:

"... plaintiff's claim under Count II in the instant case cannot be adjudicated without reference to and reliance upon the Wisconsin statutory law and the organic law of the corporation." (Petition page 12).

Thus, both issues, which are spelled out in detail in the Questions Presented section of Petitioner's brief on the merits, were explicitly raised in the Petition which this Court granted.

It is true, as the Plaintiff has asserted, that the practice of this Court has been to refuse to consider questions not raised in the petition. This self-imposed limitation of review is, of course, a matter of practice rather than the power of the Court. Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 418 (1951). However, that practice is not applicable in the present circumstances. The cases upon which the Plaintiff relies deal with questions which cannot by any stretch of the imagination be considered "subsidiary question[s] fairly comprised" in the questions raised by the petition for certiorari.¹

The Petitioners are confident that the Court will interpret its Rule in light of its purpose.

"The purpose of requiring a statement of the Questions Presented is, of course, to apprise the Court and the respondent of the issues which the petitioner is seeking to have reviewed." Stern & Gressman, *Supreme Court Practice*, § 6-42 (3d Ed. 1962).

¹ In *Local 1976, United Bro. of Carpenters v. NLRB*, 357 U.S. 93 (1958), petitioner sought, in his brief on the merits, to raise questions of the capacity of an agent and the sufficiency of evidence as questions to be decided before this Court could reach the question of the relation between a hot cargo clause in the collective bargaining agreement and the charge of an unfair labor practice, which was the question presented in the Petition for Certiorari. Similarly, in *Irvine v. California*, 347 U.S. 128 at 129 (1954), the petitioner, who had applied for certiorari on the ground that evidence submitted in a state criminal prosecution was unconstitutionally obtained, thereafter attempted to raise questions in his brief on the merits relating to the instructions to the jury and the applicability of a California Immunity statute which, he maintained, should have been applied by the California courts. Clearly, such questions are neither subsidiary to the questions presented by those petitions nor are they fairly comprised within such questions; the Plaintiff's cases are simply not in point.

We submit that the issues which Petitioner seeks to have reviewed are clearly set out in the Petition and that even by misreading the second point in the Petition, as the Plaintiff appears to have done, he is nevertheless sufficiently apprised of the issue presented by the Wisconsin Security for Expenses statute. That statute has been before the Courts in this case ever since petitioner first moved for security for expenses on April 7, 1958 (R. 153). The issue was considered and decided by both the District and Circuit Courts. The statute and the rulings concerning it are referred to throughout the Petition for Certiorari. There is no reason to assume at this point that the Plaintiff has been taken by surprise to find that the Petitioner regards that statute as applicable and intends to enforce its rights under it.

If this Court were to limit the scope of its review in deference to the Plaintiff's narrow misreading of the review sought by the petition, the result could only lead to confusion and possibly to a second appeal to this Court. Certainly this question would arise in future cases probing the dimensions and nature of the federal action created here. A decision that a federal cause of action under the Securities Exchange Act exists without a ruling as to the applicability of state law would leave the District Court without guidance on this important question.

We submit that the question has been properly raised and is now before this Court under its writ.

V. THE WISCONSIN SECURITY FOR EXPENSES STATUTE IS CONSTITUTIONAL.

On the issue of constitutionality raised by the Plaintiff (p. 48), only a brief reply is necessary.

The Plaintiff seems to assert that the Wisconsin requirement for giving security for expenses is something of

novel origin and limited in the state laws to derivative actions. We would only remind the court that security for expenses is a customary requirement in the issuing of restraining orders or temporary injunctions and that the procedure is also utilized in replevin proceedings, and also in many other applications in both civil and criminal state and federal law.

The Plaintiff also seems to assume in his argument that the court in fixing the bond will be unreasonable and arbitrary and, hence he argues the statute is arbitrary and unconstitutional. Is it not fairer to assume that the court will only fix a reasonable bond? Is it arbitrary and unconstitutional when a Plaintiff without a substantial investment brings an action seeking to declare void a merger of two companies with the equities of, perhaps, thousands of stockholders involved, all of whom are satisfied with the merger, for the court to require a reasonable security for expenses from the dissatisfied stockholder who is beclouding the integrity of a merger and impairing the value of the holdings of the other stockholders?

Further, the Plaintiff argues as if a derivative lawsuit were his only remedy and hence that the requirement for a bond deprives him of all relief (pp. 49, 54). This is distinctly not the case. If he has been cheated he can bring his state actions for fraud, and as has been already pointed out, if he was dissatisfied with the merger, by using the Wisconsin appraisal provision, he could have obtained the full pre-merger value of his stock by a very simple remedy (see Wis. Stats. 189.69). (Case Brief 40), and he could then have reinvested the proceeds in the stock of his choice among the thousands of different issues listed on the exchanges.

Finally, we submit that Plaintiff's constitutionality question has been put to rest by *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949) where the subject is fully discussed.

CONCLUSION.

The Court should reverse the Court of Appeals and order Count II of the complaint stricken in its entirety.

Respectfully submitted,

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